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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger M. Young, Jr., Circuit Court Judge

Appellate Tracking No.: 2024-001803

Case No.: 2023-CP-10-05002

City of North Charleston, Respondent,

v.

Harold Simmons, Appellant.

INITIAL BRIEF

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Statement of Case

Harold Simmons operates an automobile repair garage at 3042 North Carolina Avenue in the City of North Charleston. (R.O.A. page ___[photo of building]) The building at 3042 has been used as a garage prior to North Charleston being incorporated. In 2023, the City of North Charleston issued 15 municipal citations against Harold Simmons, alleging that his garage is a nuisance because of "inoperable" vehicles parked on his property and on the public street in front

of his business. On August 9, 2023, the North Charleston Clerk of Court scheduled a jury trial on one of the alleged nuisance charges, Citation No. 4102P0169386. (R.O.A. page ___[citation]) After selecting a jury, the State made its opening argument. During defendant's opening statement to the jury, the presiding judge, *sua sponte*, interrupted counsel, declared a mistrial, over the objection of the defense, and dismissed the jury. The Court asserted counsel made an improper statement to the jury by asserting the case was a criminal case, not a civil case, and the defendant faced criminal penalties if convicted. (This statement was in response to the prosecutor's attempt to describe the case as a civil matter, a disagreement that continues.) Rather than re-try the case, the parties negotiated a resolution that allowed the appellant to plead *nolo contendre* to two charges, one for removing a City posted notice (Citation 29927) for which the Court ordered appellant to pay a $50.00 fine, and the second (Citation 4102P0169386) to allowing a nuisance at his garage for which the Court imposed a 30-day suspended sentence and a $1,097.00 fine, which appellant paid. The parties engaged in a lengthy colloquy with the Court on what was or was not allowed at 3042 North Carolina Avenue. This colloquy is in the Record on Appeal at pages ___-___. The Municipal Court never reduced its Order to writing.

As the colloquy demonstrates, the Court placed conditions on the suspended 30-day sentence (quoted below on page ___). The substance of the agreement was that the Court required appellant to keep "inoperable" motor vehicles inside the appellant's garage.

On September 12, 2023, more than thirty (30) days after the August 9th imposition of the 30-day suspended sentence, the City of North Charleston filed a "motion for hearing" with the Court asking for a hearing on whether appellant violated the terms of his suspended sentence: "Comes now the City Prosecutor for the City of North Charleston and moves this Honorable Court to conduct a hearing to determine if the defendant is in compliance with the Court's Order, and

states as follows . . .” (R.O.A. pg. ___) The September 12th Motion for Hearing contains no identification of alleged violations.

On October 5, 2023, the appellant filed a motion to dismiss and demand for jury trial, along with a Memorandum of Law, pointing out that the 30-day suspended sentence elapsed prior to the City filing its “motion for hearing.” The motion also pointed out that the appellant received insufficient notice of the allegations he was facing. R.O.A. page ___[motion to dismiss] The parties appeared before the Municipal Court on October 6, 2023, at which time appellant renewed his several objections to the proceeding, including, but not limited to the fact that § 17-25-110, S. C. Code, ann. ended the Municipal Court’s jurisdiction over the appellant’s August 9, 2023, sentence.[1] Because the maximum sentence of incarceration a Municipal Court can impose under § 14-25-45, S. C. Code, ann. is thirty (30) days,[2] appellant cannot be required “to do service under such sentence beyond and after the expiration of such period,” which in the appellant’s case exceeded the jurisdictional limit of the Municipal Court’s thirty (30) days’ suspended sentence. The Municipal Court overruled all of appellant’s objections, took testimony from a Code Enforcement officer who testified he took photographs of two motor vehicles parked on appellant’s property, one of which had a flat tire and one which was missing a bumper. He testified he made no further inquiry as to whether either vehicle was “inoperable” because, neither vehicle met “federal highway safety standards.”[3] The trial judge overruled all the appellant’s evidentiary objections and refused appellant’s motions to dismiss (“directed verdict of acquittal) prior to taking testimony, when the City rested, and again at the close of the evidence. Based on these photos and

[1] § 17-25-110 says: “When the sentence of any person who has been sentenced by a court of competent jurisdiction of this Sate shall be suspended by a judge of such court such suspension shall run for the period of time prescribed by such judge in the sentence or order of suspension and no person who has had a sentence so suspended shall be called back and required to do service under such sentence beyond and after the expiration of such period.”

[2] “The [Municipal] Court shall also have all such powers, duties, and jurisdiction in criminal cases made under state law and conferred upon magistrates.”

[3] The October 6th appearance before the Municipal Court is not transcribed, but there is an audio file.

the Code Enforcement Officer's opinion, the Municipal Court ordered appellant immediately taken into custody and confined to the Charleston County jail for thirty (30) days. The Municipal Court's incarceration Order was an oral order and has never been reduced to writing. (The City contends the notation at the bottom of Citation 4102P0169386 is the Court's written Order.)

Once law enforcement took the appellant into custody, counsel asked for an appeal bond, which the Municipal Court refused to consider until after appellant filed a Notice of Appeal. The appellant filed a notice of appeal on October 6, 2024 along with a request for an appeal bond. The Municipal Court granted appellant a personal recognizance appeal bond, and the Charleston County jail released the appellant later that same night. (As part of the *nolo contendre* plea on August 10, 2023, the appellant previously paid a $1,097.00 fine.)

On October 6, 2023, appellant appealed to the oral order of incarceration to the circuit court and thereafter filed an amended notice of appeal on October 15, 2023. (R.O.A. pages __ and ___). The parties appeared before the circuit court on September 9, 2024. On October 2, 2023, the circuit court affirmed the decision of the Municipal Court by written Order (R.O.A. page ___), and on October 7, ___, 2024, appellant filed a timely Motion for Reconsideration. (R.O.A. page ___) The circuit court denied reconsideration on October 14, 2024. R.O.A. pg. ____) Appellant received written notice of the entry of the final order denying reconsideration on October 15, 2024, and on October 23, 2024, filed a Notice of Appeal to this Court. (R.O.A. pg. ___)

Statement of Facts

Harold Simmons purchased 3042 North Carolina Avenue on June 15, 2000. The original "purchase" was a lease/purchase agreement that led to extended litigation in a dispute over whether appellant was or was not in breach of the lease/purchase agreement at Case Numbers 2010-CP-10-8027 and 2014-CP-10-1635. The Court resolved this dispute by confirming title in the name of the appellant through a Master's Deed filed October 25, 2018 at Deed Book 0756 at Page 020. As

the photos of the building demonstrate (R.O.A. pgs. ___-___), it is obviously a garage and has been a garage since originally constructed. The garage faces North Carolina Avenue, which is a state-owned road (S-1026) bordered by Spruill Avenue to the west and the former Charleston Navy Base to the East. The appellant and the City have been at odds as to whether the appellant's location must be rezoned to commercial or whether it is a legal non-conforming use.[4] As a result of this tension, the City issued numerous citations to the appellant alleging his garage is a nuisance as defined by § 9-67 of the North Charleston ordinances. This section says:

> **Sec. 9-67. - Nuisances declared.**
>
> Without limitation upon and in addition to any conditions which may constitute common nuisances under section 9-66, the following are declared to be unhealthy and unsightly conditions constituting public nuisances and endangering the life, health, safety, welfare and property of the entire community: conditions which afford a breeding place for and/or attract insects, rodents or reptiles or otherwise create a substantial risk of danger to health and/or safety through disease, fire, safety hazards or other means, including, but not limited to:
>
> . . .
>
> (4) (a)
> Trucks, cars, trailers, boats, and similar items that (i) fail to comply with state or federal safety regulations or are incapable of self-propulsion (if the item in question is normally self-propelled), or are dismantled; and (ii) which are left in such state or condition for more than seventy-two (72) hours.
>
> (b) Excepted from this subsection 9-67(4) declaration of nuisance, however, are:
>
> (i) Such items when retained for purposes of repair or towing storage on the premises of a properly zoned repair or towing facility; provided that for any such vehicle retained more than ninety (90) days, the towing or repair facility must be able to document reasonable efforts that have been made to repair to return the vehicle and demonstrate reasonable cause for why repair or return has not been completed. Examples of reasonable cause for why repair or return has not been completed would include, but not be limited to, time statutorily required for compliance with state laws or back order time associated with parts required for repair.
>
> (ii) City licensed restoration vehicles that comply with all requirements of chapter 10.5, article VII of the Code of Ordinances for the City of North Charleston.

[4] Parts of North Carolina Avenue are zoned residential; parts are zoned commercial. There is a second garage on the corner of North Carolina Avenue and

Standard of Review

The standard on review from a municipal court in this case is not clear because both the Court and the City refused to answer the appellant's inquiry as to whether he was facing a Rule-to-Show-Cause for alleged contempt of court or a criminal matter of sentencing. Municipal Courts have no civil jurisdiction under § 14-25-45, S. C. Code, ann., but every court has the inherent power to punish for willful disobedience of its Orders. *Ex Parte: Mamie L. Jackson, In Re: City of Columbia, v. Mamie L. Jackson*, 381 S.C. 253, 672 S.E.2d 585 (Ct. App. 2009) (*Ex Parte: Jackson* is also instructive because there, the City of Columbia filed an injunction action in common pleas to enjoin the defendant from accumulating trash on her property. When the City brought a Rule-to-Show-Cause for contempt, the circuit court sentenced her to 90 days, which was reversed on appeal on a right-to-counsel analysis. It is significant that the City of Columbia went about it the right way instead of taking North Charleston's shortcut of invoking criminal prosecution of what is clearly a civil dispute.) The City's September 12, 2023 "motion for hearing" is not specific. In appeals from the Municipal and Magistrate's Court in criminal cases, the parameters for the standard of review are set but not precisely defined other than to say that there is no new testimony taken. See § 14-25-95 and § 18-3-70, S. C. Code, ann., which authorize the appellate court to "confirm the sentence appealed from, reverse, or modify it, or grant a new trial, as to the court may seem meet and conformable to law." See *State v. Gordon*, 414 S.C. 94, 777 S.E.2d 376 (2014):

> In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.*
>
> "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Id.* In interpreting a statute,

"[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459.

State v. Gordon, 777 S.E.2d 376, 378 (S.C. 2015) (question whether Highway Patrolman's failure to video suspect's head during administration of nystagmus test required dismissal)

The circuit court relied on *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 341, 713 S.E.2d 278, 282 (2011) for the proposition that appellate courts' reviews of municipal court convictions are limited to correction of errors of law raised by proper exceptions. As the Supreme Court said in *Town of Mt. Pleasant v. Roberts*:

"In criminal appeals from a municipal court, the circuit court does not conduct a *de novo* review; rather, it reviews the case for preserved errors raised to it by an appropriate exception." *City of Cayce v. Norfolk S. Ry. Co.*, 391 S.C. 395, 399, 706 S.E.2d 6, 8 (2011). See S. C. Code § 14-24-105 (Supp. 2010) ("There shall be no trial *de novo* on any appeal from a municipal court."). "Therefore, our scope of review is limited to correcting the circuit court's order for errors of law." *Suchenski* 374 S.C. at 15, 646 S.E.2d at 880.

Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 341 (S.C. 2011)

Appellate practice moves in surprising ways because while the circuit court correctly identified *Town of Mt. Pleasant* for the appellate standard of review on appeals from Municipal Court, there is a surplus of irony that the Supreme Court affirmed the dismissal of a D.U.I. prosecution because the Town of Mt. Pleasant demonstrated bad faith by intentionally neglecting to install video cameras in its police vehicles to subvert the requirement that D.U.I. arrest evidence be preserved. This same municipal bad faith appears here, especially as discussed in Argument 4 below when the appellant stumbled upon undisclosed bad conduct. The point is: while appellate review of Municipal criminal convictions is limited to the record below, reviewing courts are empowered to address governmental misconduct.

By analogy, § 18-7-130, S. C. Code, ann., governs appeals from Magistrate's Court's civil cases, which is relevant here because even though Municipal Courts do not possess civil jurisdiction, the October 6, 2023 appearance before the Court was no different from a Rule-to-

Show-Cause since the pleading summoning appellant to court did not reveal the alleged violation. In those cases: "The appeal shall be heard by the court upon all the papers in the case, including the testimony on the trial, which shall be taken down in writing and signed by the witnesses, and the grounds of exceptions made, without the examination of witnesses in court." On several occasions, appellant inquired of the City and the Court as to whether it considers this case a criminal or a civil contempt brought by a Rule-to-Show-Cause, but to date, North Charleston refuses to commit. The City's original September 12, 2023 "motion for hearing" is not clear. (R.O.A. page ___) When the parties appeared before the Municipal Court, appellant's counsel once again asked for clarification as to whether the parties were before the Court on a Rule-To-Show-Cause seeking a finding of contempt of court or whether the parties were before the Court on a criminal process of revoking the appellant's suspended sentence. Even though Municipal Courts do not have civil jurisdiction pursuant to § 14-25-45, S. C. Code, ann., they can punish for contempt, and based on the City's "motion for hearing," appellant operated on the assumption that this appeal is from a finding of contempt of court brought before the Court on a Rule-to-Show-Cause. The absence of a written Order leaves both the parties and the Court to grope in the dark as to the nature of the hearing below. If the case is a civil case of contempt of court, then the City's burden of proof on holding the defendant/appellant in contempt is "clear and convincing." If it is a criminal case, then the City's burden of proof is "beyond a reasonable doubt." Either standard requires more than a "**suggestion**" that the evidence supports a willful disobedience of a court Order and yet, this is the standard of review erroneously applied by both courts below. See Magistrate's Return and circuit court's Order under review at page 6, R.O.A. page ___, quoted below on page ____.

Arguments

Argument 1: Pursuant to § 17-25-110, the Municipal Court lost jurisdiction over the appellant at the expiration of the maximum 30-day suspended sentence that the Municipal Court could impose.

Before, during, and following the Court's October 2nd oral Order sending appellant to jail for thirty days, counsel inquired of the City to define its legal position to disclose whether the appellant faced an application for contempt of court or the imposition of a criminal sentence. In the runup to this appeal, appellant again requested clarification, a reasonable inquiry, which is necessary for counsel to calculate appellate deadlines. To date, the City has refused—and still refuses—to reply. Because a civil (contempt of court) and a criminal case (imposition of sentence) each has a different timetable for any defendant/appellant to decide whether to accept the pronouncement of the Court or pursue judicial review, it is a reasonable question, and the City has a duty to speak. See Rule 3.8, Special Responsibilities of a Prosecutor, *S. C Rules of Appellate Procedure*. It should be a routine disclosure, but the Municipal Court's failure to provide a written Order combined with the City's refusal to commit leaves both the appellant and this Court to grope in the dark as to whether this is an appeal from an oral finding appellant in contempt of Court or whether this is an appeal from an oral Order imposing a 30-day criminal sentence.

The City contends (apparently) the issue before the Court is an appeal from the imposition of a 30-day sentence of incarceration in a criminal case, by the time the City issued is September 12, 2024 "request for hearing," the Municipal Court's criminal jurisdiction over appellant had ended because the maximum incarceration a Municipal Court can order is thirty (30) days, and §17-25-110 prevents a court from hauling a criminal defendant back into court when the maximum sentence period has expired. Otherwise, the sentence would either be a life sentence or a sentence for an indeterminate period, either of which is forbidden. The circuit court concluded that this is

a criminal appeal on page 3 of its Order: "In criminal appeals from the municipal court, the circuit court is bound by the municipal courts findings of fact **if there is any evidence in the record which reasonably supports them**." (emphasis added) If this is a criminal appeal, then the City has the responsibility to provide the transcript of the hearing of the appearance before the Municipal Judge as part of its Return without which no reviewing Court can ever determine "if there is any evidence in the record which reasonably supports" the conclusion in the lower court. See § 14-25-105, S. C. Code, ann., discussed in detail below. There is no evidence discussed by either the Municipal Court in its Return or in the Circuit Court's Order sustaining a 30-day sentence other than a "suggestion" of noncompliance. As discussed below, it is uncontested that the photographs taken by a Code Enforcement officer—omitted from the Municipal Court's Return to the circuit court—are the **only** evidence of defendant/appellant's alleged violation in the record. Both the Municipal Court's Return and the Circuit Court's review rely on the same basis: "photos included several vehicles on Defendant's property, **which all appeared to be inoperable**." (Magistrate's November 13, 2023, Return at page ___R.O.A., emphasis added) This is the only defendant in South Carolina jurisprudence to be sentenced to jail on a "suggestion." (As discussed below in more detail, the only evidence produced at the September 12, 2023 hearing was a Code Enforcement Officer's presentation of photographs of an automobile with a flat tire and a photo of the appellant's pick-up truck missing a front bumper, which formed the basis of his speculative "opinion" that the two vehicles did not conform to federal highway safety standards and therefore the appellant was in violation of the Court's August 9, 2023, oral order.)

2.

Lack of Due Process

The City of North Charleston never provided notice to the appellant of how in was in violation of the Municipal Court's oral Order or why he was being hauled back into Court, and this lack of specificity prevented the appellant an opportunity to understand the allegations of noncompliance or an opportunity to prepare to meet them.

As set forth above and as demonstrated by the Record on Appeal (page ___), the City's September 12, 2023, "motion for hearing" contains no identification of alleged noncompliance and it is vague as to what it is or what it seeks. The "motion for hearing" identifies its prayer for relief as: "Comes now the City Prosecutor for the City of North Charleston and moves this Honorable Court to conduct a hearing to determine if the defendant is in compliance with the Court's Order, and states as follows . . ." (R.O.A. pg. ___) This motion contains no identification of the noncompliance and does not come close to furnishing the minimum information required to allow appellant to prepare for the hearing. See Rule 4, *S. C. Rules of Criminal Procedure* (made applicable to the Municipal Court by Rule 37): "An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, **shall state with particularity the grounds therefor, and shall set forth the relief or order sought**." (emphasis added) The City's motion omits any "particularity," and this record demonstrates the only notice appellant received as to the allegations against him occurred when the Code Enforcement Officer took the stand and testified that he took photographs but made no further inquiry as to whether the vehicles were or were not operable.

The only evidence in this record of the "court's order" imposing the thirty-day suspended sentence is the extensive colloquy with the Municipal Court on August 9, 2023, when it accepted appellants' *nolo contendre* plea. The entire colloquy is found in the Record on Appeal at pages ___-____, and as this Court can see for itself, the Municipal Court was specific that appellant must keep "inoperable" cars inside the garage. The Court was specific as to what constituted an "inoperable" car; to wit, a motor vehicle that could not move under its own power unless it were

waiting for repair parts to be delivered. See Record on Appeal at page ___, where the Municipal Court stated:

THE COURT: No one is—all I can say is everyone is subject to the same ordinance. And right now, the ordinance requires that if you have—if you have any vehicles on your property, they must be running. And if they are not running, can you put them in a garage? Do you have a shed that you can put them in while you're waiting on your parts or while those people that—other cars are coming in and out, and those cars that are not running be put in your garage? That way the City won't see them. They have no idea what's in your garage if they're not running.

MR. BOURNE: We'd be content with that, Judge.
R.O.A. page ____ [tr. August 9, 2023, page 28, lines 10-22]

Despite the statutorily required specificity of the suspended sentence—maximum of thirty (30) days and the sentencing judge's oral instructions—following the *nolo contendre* plea on August 8, 2023, the City's September 12th Motion for Hearing contains no identification of the alleged violations, which the appellant learned only after Officer Pillai took the stand and testified that he passed by the appellant's garage and took photos of a car with a flat tire and a photo of the appellant's personal pick-up truck without a front bumper. It is undisputed that Officer Pillai did not speak to appellant or make any inquiry about the status of the vehicles he photographed. He simply took the photos, assumed he had enough to send appellant to jail, and left. Appellant addresses the sufficiency of the evidence in the next section, but for purposes of a due process analysis, it is undisputed that the City hauled the appellant back into court past the maximum 30-day period a suspended sentence could run and failed to provide even a hint as to the alleged infraction that was hauling him back into court to face incarceration.

An examination of the City's September 12th motion demonstrates that the City only requested a "hearing" to determine if the Court would bring appellant back. In other words, it reads like a request for a determination of probable cause, not an indictment or a Rule-to-Show-Cause with minimal specificity to alert the appellant to the allegations he was facing. There are,

of course, no indictments in Municipal Courts, but even citations, which function like indictments, put defendants on notice of the allegations. In a charging document, like an indictment, it must provide sufficient particularity "to put the defendant on notice of what he is called upon to answer. See *State v. Carrier*, 441 S.C. 547, 895 S.E.2d 679 (Ct. App. 2023):

> "[A]n indictment is a notice document. The primary purpose of an indictment [is] to put the defendant on notice of what he is called upon to answer." *Edwards v. State*, 372 S.C. 493, 496, 642 S.E.2d 738, 739 (2007). Specifically, an indictment must "apprise [the defendant] of the elements of the offense and allow him to decide whether to plead guilty or stand trial, and enable the circuit court to know what judgment to pronounce if the defendant is convicted.

As set forth in the appellant's October 15, 2023 "amended notice of appeal," the appellant pointed out to the circuit court that the prosecutor had a duty to provide sufficient identification and notice to the appellant of the allegations the City was calling upon him to address citing *State v. Heyward*, __ S.C. __, __ S.E.2d __ (Opinion no. 28182, Oct. 5, 2023)

> "Prosecutors are ministers of justice and not merely advocates." *State v. Quattlebaum*, 338 S.C. 4441, 449, 527 S.E.2d 105, 109 (2000). They must ensure an accused is afforded his constitutional rights and that any conviction is based on proper evidence admissible under the rule of law. See Rule 3.8 cmt. 1, RPC, Rule 407, *SCACR*. Should a prosecutor instead push the envelope and pursue a guilty verdict at all costs—for example, by seeking to introduce dubious evidence designed to improperly inflame the emotions of the jury—the prosecutor's actions fail to serve justice. See *State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 562, 578, 541 S.E.2d 813, 822 (2001)[5]

In affirming the Municipal Court, the Circuit Court never addressed this prosecutorial duty of providing sufficient notice, which, when combined with the suppression of the existence of the unlawful civil action the City filed (discussed in Argument 4 below) paints an unconscionable picture of governmental misconduct. Because of the lack of specificity in the "motion for hearing,"

[5] This quotation is from Justice Kittredge's concurrence in a case affirming a conviction, as modified, in a serious murder prosecution, resulting in a life sentence. The Supreme Court noted several errors at trial but affirmed because the evidence was so overwhelming, it found the errors "harmless." Here, the Court sentenced appellant to a maximum of 30 days on evidence so thin as to be nonexistent. The lack of notice, paucity of evidence in a zoning dispute in combination with the accidental discovery of a companion, non-disclosed civil action is troubling.

Appellant assumed—incorrectly—that the City's pleading was a Rule-To-Show-Cause for an alleged contempt of court. As the Court can see for itself, the pleading gives no indication of the particulars appellant is being called upon to answer, a fundamental due process deficiency discussed separately. However, if the "motion for hearing" is an application to revoke the suspended sentence and impose the maximum penalty the Municipal Court possesses, then clearly the Municipal Court no longer possessed jurisdiction to impose a sentence of incarceration since the maximum period of the suspended sentence—30 days—elapsed prior to the City filing its motion for hearing. See § 17-25-110, S. C. Code quoted above. The circuit court compounded the Municipal Court's error by grounding its decision on this precise statute but reached a conclusion precisely opposite of the plain and ordinary meaning of the statute, which is not the least ambiguous. The circuit court wrote in the Order under review: "Pursuant to South Carolina Code § 17-25-110, the Municipal Court retained jurisdiction to ensure that Appellant complied with the conditions of the suspended sentence." This conclusion is, of course, the precise opposite of what the statute says! Under the circuit court's view, the suspended sentence of the Municipal Court is either indefinite or lasts in perpetuity, and when read against a case like *In Re: Jackson, ibid*., the City's subterfuge is laid bare in attempting to use criminal process to shortcut the injunction procedure.

3.

Sufficiency of the Evidence

The sole basis for the Municipal Court to incarcerate appellant for thirty (30) days was based on a "suggestion" that photographs depicted "inoperable" cars.

Whether the Court applies the "clear and convincing" or the "beyond a reasonable doubt" standard to this case, both the Municipal Court and the Court of Common Pleas erroneously grounded their decisions upon the thinnest of evidence; to wit, a Code Enforcement Officer's speculation about photographs that he made no effort to investigate. Both courts concede that the

entire evidence upon which the Municipal Court imposed a 30-day sentence is based entirely on a Code Enforcement Officer's photographs depicting two vehicles on defendant/appellant's property. One is a photo of an automobile with a flat tire and the second is a photograph of a pickup truck missing a bumper. These photos are the sole basis on which the Municipal Court imposed a 30-day sentence, a finding the Court of Common Pleas simply accepted without analysis: "These images depicted vehicles in a state that **suggested non-compliance with the Municipal Code**, such as the vehicle with a flat tire or the vehicle missing a bumper." (Order under Review at page 6, emphasis added) This is exactly right! The best that anyone can say about these photos, looking at them in the light most favorable to the City, is that they "**suggest**" noncompliance, but they absolutely do not prove non-compliance any more than a photograph of a person leaving a grocery store carrying a loaf of bread "suggests" shoplifting. No photograph without more "suggests" let alone proves that the vehicle is "inoperable." The law requires more than a "suggestion" of a violation before it incarcerates its citizens, especially for an alleged zoning violation, especially where the City of North Charleston has been pursuing the defendant/appellant for years to move him off his property. (See newly discovered evidence discussed below.) The record, however, is **undisputed** that the Code Enforcement officer (1) did not undertake even a slight effort to ascertain whether either vehicle met the definition of "nuisance" under either the City's ordinance or willfully refused to conform to the conditions imposed in the oral colloquy with the Court as to what constitutes compliance with the Municipal Court's Order, and (2) the pick-up truck with the missing bumper is the defendant/appellant's personal vehicle![6] Thus, the photographs, which form the entire basis of the conviction, are evidence of nothing whether the

[6] Both the City's definition of nuisance and the extended colloquy with the Court are contained *verbatim* in the defendant/appellant's amended appeal. Neither suggest defendant/appellant's private vehicle is subject to either the ordinance or the Order of the Court. Law enforcement officers are required to do more than bring a case on a couple of photos.

Court is applying the "clear and convincing" standard or the "beyond a reasonable doubt" standard. Mere suggestion is insufficient as a matter of law. (See amended appeal at page ___ R.O.A. for detailed citations of the standard of proof required for a finding of contempt.) The trial court denied the appellant's pre-hearing motion to dismiss and timely asserted motions to dismiss ("directed verdict of acquittal") at the close of the City's case and renewed at the end. (The audio recording was not reviewed by the circuit court, but it is included here as part of the Record on Appeal.) Of course, a reviewing court lacks the ability to determine if "there is any evidence in the record which reasonably supports" the Municipal Court's decision because the City failed to include the photos in the Magistrate's Return or providing even an audio recording of the hearing. It was therefore impossible for the circuit court to review the case to determine if they were sufficient. On the other hand, a reviewing court does not need the photos to conclude that still photos of an automobile provide no evidence of its ability to move under its own power, the definition of "inoperable." Obviously, the City cannot penalize the defendant/appellant—especially with incarceration—for owning a vehicle without a bumper, and his personal vehicle is not subject to either the nuisance ordinance or the lower court's Order. Likewise, an automobile with a slow leak in a tire is no more a nuisance or "inoperable" as is any motorist on the side of any road with a flat tire. Calling a car with a flat tire a "nuisance" or "inoperable" is nonsensical, but even looking at such a fact in the light most favorable to the City, it must do more than snap a photo and offer it as evidence without making some minimal inquiry as to whether the vehicle is "inoperable," or as the Municipal Court said, if they are "running." See R.O.A. page __[tr. of August 12, 2023 *nolo contendre* plea] Otherwise, the City could snap a photo of someone sitting on a park bench with her eyes closed and arrest her for vagrancy because the photo "suggests" vagrancy. Such leaps to conclusion based on appearance have been lampooned from the Marx

Brothers ("Either my watch has stopped, or this man is dead") to Monty Python ("How do you know she's a witch? She looks like one."). It is the classic logical fallacy of begging the question, *i.e*., circular reasoning: "The Bible is true because it is the word of God." Likewise, a photo of the defendant/appellant's personal motor vehicle is not evidence of anything since his personal vehicle is not subject to the Court Order. The Code Enforcement Officer assumes the vehicle is covered by the Court's Order and therefore evidence of a willful refusal to obey the Court because, like King Arthur's witch, it looks like one. The Order under review compounds the error by concluding photos "suggest" non-compliance, which is legally insufficient to demonstrate the appellant's intention or willful disobedience of an oral court order. Proof of willful disobedience or a criminal act requires more than begging the question before local government starts incarcerating citizens because of how something looks. To make out a willful disobedience or a criminal act warranting incarceration, a Code Enforcement Officer must do more than snap a photo without even the slightest effort to undertake a minimal investigation. This is why police officers do not arrest everyone leaving a store carrying groceries or sitting on a park bench with eyes closed. In affirming the decision below to incarcerate the defendant/appellant for thirty days on nothing more than uninvestigated photos taken at one moment in time that "suggest" a violation, the circuit court overlooked overlooks and it misapplied its own evidentiary standard that the conviction must be supported by "any evidence in the record which **reasonably** supports" the decision below. (R.O.A. page ___, emphasis added) There is nothing "reasonable" about a photograph of a vehicle missing a bumper when the vehicle is not subject to the Court's Order. Had the Code Enforcement Officer made even a minimal investigation, then, and only then, would the photos be relevant or "reasonably" support the decision below. In trials, courts require an adequate foundation to be laid prior to the admission of photographs. The error here is that the record below is clear that the

pickup truck belongs to the defendant/appellant. The Municipal entire basis for incarcerating the appellant is nothing more than photographs of two cars, one of which was not even subject to the Court's Order. Thus, the answer to the question of "why is this photograph evidence of a violation" must be something more than: "Because it looks like one." Whether the Court applies the willful disobedience of the Rule-to-Show-Cause standard or the beyond-reasonable-doubt standard of a criminal case, the evidence in this case does not come close to sustaining a sentence of thirty (30) days in jail. There is not a scintilla of evidence in this case that these vehicles were "inoperable" and that was the condition the Municipal Court placed on the appellant by an oral order.

4.
Sufficiency of the Evidence on Appeal & Lack of Meaningful Judicial Review

The sole basis for the Municipal Court to incarcerate appellant for thirty (30) days was based on a "suggestion" that photographs depicted "inoperable" cars, and yet the Municipal Court failed to provide the circuit court, as required by § 14-25-105, S. C. Code, ann. with either a transcript of the Rule-to-Show-Cause/Contempt hearing or an audio recording of the August 8, 2023 contempt proceeding or even the photographs offered by the defendant/appellant to rebut the City's allegations.

The decision to send appellant to jail for thirty (30) days was legal error because it was based on insufficient evidence (discussed in Argument 3 and in more detail in the next paragraph). First, the City contends that appellant violated an **oral** Order. As the audio tape of the October 6, 2023 Rule-to-Show-Cause hearing demonstrates—an audio tape the City failed to provide to the circuit court as part of its Return, the City's allegations were fluid. Even though the appellant transcribed the *nolo contendre* plea at his expense (and cannot afford to transcribe the much longer Rule-to-Show-Cause hearing) to demonstrate precisely the Court's suspended sentence terms, both the city, the Municipal judge, and the circuit court ignored it because all three realized that photographs of cars without more did not demonstrate that they were inoperable. In the middle of the hearing, after the City realized it lacked the evidence to incarcerate appellant, it changed

strategy and went off on a tangent that car without a bumper (which turned out to be appellant's personal vehicle and not part of the oral Order) or a car with a flat tire were "inoperable" under the Municipal Court's oral Order. Whether they are or are not is immaterial because in imposing a suspended sentence on the appellant—quoted above on page 13—the City specifically agreed to the terms imposed, which were those cars "not running" must be inside appellant's garage: "**MR. BOURNE:** We'd be content with that, Judge." (R.O.A. page ___) Even though the City was content with the Court's terms on August 9th, the City's summer content morphed into its fall discontent when it realized it lacked the evidence to secure a jail sentence on compliance. Then the City's concern metamorphosed into "highway safety standards" on October 6th! In placing the conditions of the suspended sentence on the appellant, the Municipal Court made no mention of "federal highway standards," and appellant was prejudiced by the City's mid-hearing shift away from the terms announced by the Court. The circuit court compounded this error concluding: "While Appellant argues that minor defects, such as a flat tire, do not render a vehicle 'inoperable' under the terms of the Ordinance, the Municipal Court found these conditions violated the safety and nuisance standards defined by Ordinance 9-67." (R.O.A. page ___[Order under review at page 7]) At the considerable risk of sounding unprofessionally flippant, so what? The City did not haul the appellant back into court to address "federal highway safety standards" or even the City's "safety and nuisance standards," for which the General Assembly provides a statutory remedy in civil court. See § 15-43-10, S. C. Code, ann., "Abatement of Nuisances."

The reason the circuit court followed the City into the rabbit hole of irrelevant disputes is because it had no opportunity to understand, let alone analyze the issues without an adequate record. All the circuit court had before it was the Municipal court's 2-page "Return," even though the City is obligated to provide to the reviewing Court the "written report of the charges preferred,

the testimony, the proceedings, and the sentence or judgment." See § 14-25-105, S. C. Code, ann., "Municipal judge to make return to Court of Common Pleas in the event of appeal; no appeal de novo" The appellant discovered these deficiencies only while assembling the necessary documents for the Record on Appeal to this Court and in the process of assembling a Record on Appeal, discovered there is nothing in the circuit court file except the 2-page Return. Thus, the circuit court had no evidentiary ability to reach any of the conclusions it reached other than to accept the argument of counsel as fact. By contrast, appellant provided the *verbatim* transcript of the August 9, 2023, *nolo contendre* plea to establish that the condition the Municipal Court placed on appellant was only that cars "not running" be placed inside the garage. See R.O.A. page __, quoted above. Thus, the parties were before the appellate court on one, and only one issue: did the appellant put the cars "not running" inside his garage or not? He did, and that should have been the end of the matter, but in reviewing the case, the circuit court ignored that the City failed to provide a *scienter* of evidence on that issue and the circuit court committed legal error in following the city down the rabbit hole of federal highway safety standards, affirming the sentence on nothing more but a 2-page Return and argument of counsel.

A.
Summary of the evidence at the October 9, 2023 Rule-to-Show-Cause Hearing

The City provided evidence from two witnesses and photographs of appellant's garage taken by a Code Enforcement Officer on August 10, 2023, September 5, 2023, and September 19, 2023. The first witness was A. J. Davis, the self-described President of the Chicora Cherokee Neighborhood Association, an organization he testifies meets the 4th Monday of every month via Zoom. Mr. Davis's bias was clear, testifying he has been opposing appellant at various meetings for years. Paradoxically, he testified that (at the 49 minute mark) that since the Court's August 9th

2023 oral Order, the cars at the garage "look like they are in better shape . . . more modern." He conceded he had no information as to whether the cars at the location were or were not "running."

The second witness was Code Enforcement Officer Amberto ("Pete") Pillai. He is the one who took the photographs placed in evidence, and he made several important concessions:

First, he was not present at the August 9th *nolo contendre* plea and did not know what the Judge ordered. (51 minute mark) However, at the 69 minute mark, the Prosecutor urged the Court to allow Officer Pillai to explain why he thought the appellant had not conformed to the Court's August 9th oral Order! The trial court overruled appellant's objection on allowing this opinion evidence. On cross-examination at the 76 minute mark, Officer Pillai conceded that he "was not aware of the sentence of the Court."

Second, he made no inquiry or undertook no investigation as to whether the cars he photographed were or were not "running." When pressed on why he did not attempt to speak to appellant or make any kind of inquiry about whether the cars were or were not running, he testified: "I don't have to ask" at the 74 minute mark. Instead, he testified he could draw his own conclusions from the "crud on the windshield" (Minute 72) He spent a lot of time on a flat tire on a Toyota as evidence that the car was "not running," but when shown a photo of the same car with the tire inflated, he launched into a long explanation of how he could tell that it would go flat again. (Minute 61)

Third, when shown photographs of parked cars on nearby garages and asked if he could discern from the photos which cars were running and which were not, he conceded the point and admitted he could not tell, but insisted, at Minute 74, "I don't have to ask." (Defendant's Exhibit 7)

The point is that the City's evidence was far from sufficient to meet either the "clear and convincing" threshold of a civil case or the "beyond a reasonable doubt" standard of a criminal case, and when the City realized mid-hearing it was not close to either standard, the City pivoted to federal highway safety standards, which was not the issue before the Court. Moreover, the appellant testified without contradiction that the Ford pickup truck missing a bumper is his personal vehicle and as such not subject to the Order. He also identified the City camera that has his garage under 24/7 surveillance to counteract the issue disgracefully interjected by the City's witness, A. J. Davis at Minute 36. To give the City credit, it declined to follow up on that canard. Appellant testified as to each vehicle, explaining that each one is "running," and that any vehicle that is not is inside the garage exactly as the Court ordered. In reviewing the case for error, the circuit court reviewed none of this evidence because the City failed to provide it, which is a violation of its statutory duty. Therefore, if the sentence is not reversed outright, it must be remanded for redetermination in light of the record as established on August 9, 2023.

5.

Newly Discovered Evidence

The circuit court erred in refusing to set aside (or at least remand) the Municipal Court's oral Order of incarceration when appellant discovered the City filed a June 3, 2021, illegal action in Common Pleas on the same subject matter, which the City never disclosed.

Rule 60(b) of the *South Carolina Rules of Civil Procedure* authorizes a party to move to vacate a judgment based on "newly discovered evidence" or "fraud, misrepresentation, or other misconduct of an adverse party." After the parties appeared before the Court on August 19, 2024, defendant/appellant's counsel made an inquiry of the City as to whether it was aware of a decision in this case. (For example, appellant's counsel missed the City's May 28, 2024, Memorandum of Law and is inept with technology.) After receiving an unsatisfactory answer from the City (see

footnote 1 on page 2), appellant's counsel began to check the electronic filing docket sheet regularly to guard against missing a critical deadline.[7] During one of these periodic checks, counsel clicked on the wrong "*City of North Charleston vs. Harold Simmons*" case and stumbled upon 2021-CP-10-02563, a June 3, 2021 Summons and Complaint **filed by a City of North Charleston Code Enforcement Officer over the same subject matter that is now before this Court**! See R.O.A. page ___. Upon discovering this highly unusual at best, illegal at worst, filing, counsel notified the City of North Charleston of the discovery by correspondence dated September 9, 2024. The September 9th letter notifying the City of North Charleston is factual, respectful, and compliments the City of North Charleston for its high ethical standards: "I am confident that neither you nor any other Corporation Counsel is aware that an employee filed an action in the circuit court." In other words, the letter respectfully asks for an explanation as to the filing, pointing out the obvious; to wit, that the South Carolina Supreme Court takes practicing law without a license seriously, and we all agree that non-lawyer government employees are not authorized to file lawsuits on behalf of local government: "Every pleading, motion, or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is admitted to practice law in South Carolina, and whose address and telephone number shall be stated." Rule 11(a) *S. C. Rules of Civil Procedure* Instead of receiving a plausible explanation that the filing was a mistake, oversight, *etc*. and/or reassurance that the City would address the issue, the City of North Charleston unleashed a torrent of accusations against appellant's counsel re-characterizing counsel's behavior as "bizarre," "concerning," and "unethical," and further informing counsel the City was deciding how to handle such conduct, the implication being that it would file a complaint with South Carolina Disciplinary Counsel.

[7] Electronic filing is not a stress-free process.

Threatening opposing counsel with Disciplinary Counsel for raising a germane legal issue is prosecutorial misconduct of the highest order, especially where the newly discovered and undisclosed evidence is highly relevant and exculpatory, and the Prosecutor has a duty to disclose it. See Rule 407 *Appellate Court Rules of Professional Conduct*, Rule 3.8 "Special Responsibilities of a Prosecutor." The undisclosed evidence demonstrates the City's longstanding animus for the defendant/appellant and its willingness to substitute a criminal prosecution for what should be an application for injunction in civil court. See *Ex Parte: Mamie L. Jackson, In Re: City of Columbia, v. Mamie L. Jackson*, 381 S.C. 253, 672 S.E.2d 585 (Ct. App. 2009). Instead of invoking the Court of Common Plea's power to evaluate nuisance in accordance with the statutory nuisance procedure,[8] the City improperly prosecuted him criminally for the same conduct raised in the undisclosed civil action. The existence of the two actions is powerful evidence of improper animus and the City should have disclosed the existence of the civil action.

After being knocked back by these accusations, appellant's counsel wrote a second letter to the City of North Charleston on September 11, 2024, urging both sides to "pump the brakes" on accusations. The September 11th letter to the City of North Charleston also clearly expressed that the City threatening counsel with Disciplinary Counsel is never a proper response or effective deterrent to every lawyer's duty of zealous representation, but the City's reliance of additional punishment further erodes the City's commitment to its responsibly as a criminal prosecutor to seek justice.

The point of the newly discovered evidence is this: the newly discovered evidence of the City of North Charleston's animosity for the defendant/appellant over the same subject matter that is presently before the Court not only demonstrates the City's long history targeting appellant's

[8] § 15-43-10, *et. seq*., Abatement of Nuisances

garage, but also—and more importantly—illuminates the entire prosecution in a bright, new light and casts considerable doubt on the City's legitimacy in the entire process. At the very least, this newly discovered information affects:

- The defendant/appellant's right to know if the unlawful filing was undertaken with the knowledge and consent of the prosecution team, in other words, whether prosecutorial misconduct has infused the entire process, or was the filing undertaken by a rogue Code Enforcement Officer without knowledge of the City's legal department? This is critical information that the prosecutor has a duty to disclose to the defendant/appellant, unless, of course, the City's legal department was unaware of the filing.
- The defendant/appellant's right to produce evidence of coordinated action by Code Enforcement officers to target the defendant/appellant.
- The defendant/appellant's decision to accept the *nolo contendre* offer in the first instance,
- The City of North Charleston's motivation in bringing "criminal" cases while it has pending a civil action on the same subject. Appellant remains in the dark as to whether the issue before the Court is a civil zoning case or a criminal case. (It looks like an improper criminal prosecution substitution for an abatement of nuisance action.) This ambiguity arose on the very first day when the defendant and counsel initially appeared before the Municipal Cout and a jury to try a citation in August 2023. During opening statements, the presiding judge, *sua sponte*, declared a mistrial without a request by the City and **over the defendant's objection** because defendant's counsel told the jury the defendant was facing a maximum penalty of

30-days incarceration. The decision to declare a mistrial over defendant's objection obviously invoked double jeopardy, which the City realized. As a result, the procedural dilemma caused by the presiding judge declaring a mistrial on her own led to the settlement negotiations that forms the procedural history of the case as it now exists before this Court. This procedural confusion sheds additional light on the City's refusal to declare its position on whether this case is a civil or criminal case. Appellant believes this is a civil case masquerading as a criminal case, involving an appeal from a contempt of court finding on a deficient Rule-to-Show-Cause. Alleged zoning violations do not fall under the criminal side of the Court, especially where the General Assembly specifically prohibits Courts from hauling defendants back into court after the expiration of a suspended sentence. However, to promote judicial economy, Appellant acquiesces to either standard if the City will simply provide the courtesy of stating whether the City regards the case as a civil case or a criminal case.

- The Code Enforcement Officer's bias,
- The Code Enforcement Officer's coordination, and finally
- A reviewing Court's analysis of the City's statutory obligation to act in good faith

in maintaining this action whether it is criminal or civil. In other words, the City of North Charleston's illegal filing demonstrates improper motivation and a desire to secure a finding against the appellant at all costs to construct a redoubt to blunt the consequences of an obviously unlawful filing. Mr. Simmons was entitled to know about the existence of this filing, and it is shocking that the City would file it and shocking that the City would not disclose it. The discovery of this illegal filing requires either an outright dismissal for

suppressing exculpatory evidence, or at the least that the matter be remanded to consider the effect of the City's actions in allowing (if that is what it did) this unlawful filing. The newly discovered evidence requires at the most that the entire case be vacated for what is undeniably unlawful conduct amounting to prosecutorial misconduct of the highest order or at the least an evidentiary hearing to make a record on who authorized such a filing and whether it is part of a coordinated effort to violate the appellant's rights.

Conclusion

The City should never have brought these criminal citations especially while it had a civil action pending for the same relief on the same subject matter, which it never served on the appellant. While there may be a genuine dispute about whether the appellant's garage is or is not properly sited as a legal non-conforming use, or whether the operation of his garage is a nuisance, but those are civil questions, not criminal ones, especially where the General Assembly has proscribed a statutory, civil process for abatement of alleged nuisances. When the parties entered a negotiated plea for a *nolo contendre* plea, the Municipal Court required appellant to pay a fine and serve a 30-day suspended sentence with conditions. He did both. Once the thirty (30) days elapsed, the Court's criminal jurisdiction over him elapsed. It had to; otherwise, it would be an unconstitutional open-ended lifetime sentence. Obviously, the City knows how to bring an abatement of nuisance action because—unknown to the appellant on October 6th, a Code Enforcement Officer filed one! Trouble is: she is not a lawyer and not permitted to file, no one told the appellant, and the filing does not conform to the statutory requirements. Instead of pursuing the civil remedies specifically provided for these situations, the City decided to employ an improper criminal process to short-circuit the proper civil procedure. Interestingly, the City never does say how long Mr. Simmons' suspended sentence lasts. Presumably, it lasts for his life.

The Court hauled Mr. Simmons back into court after his suspended sentence expired, gave him no notice of the particulars of his alleged failures to conform to an unwritten Order and then summarily sent him off to jail for thirty (30) days based on nothing more than some photographs of vehicles lawfully parked on his property. There is not a *scintilla* of evidence in this record that the photographed vehicles were "inoperable" as the Code Enforcement Officer testified he made no inquiry. In fact, he was emphatic that he is not required to ask. It is unconscionable to incarcerate a citizen for thirty (30) days under these circumstances. For these reasons, appellant respectfully requests that this Court vacate the sentence or in the alternative remand to the Municipal Court and allow the appellant to be heard on the issue of the recently discovered evidence of governmental misconduct or at the least remanded to the circuit court with instructions to review the evidence as required by law.

Respectfully submitted,

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