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 REPLY BRIEF

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Can a Municipal Court sentence a defendant to 30 days incarceration for allegedly violating an oral order when the alleged violation occurred outside of Court?

Can a Municipal Court sentence a defendant to 30 days incarceration for allegedly violating an Oral Order without proof beyond a reasonable doubt?

Did the circuit court have a reasonable opportunity to evaluate the appeal when the Municipal Court failed to provide any evidence in support of its conclusion other than a 2-page summary, and did the Municipal Court's failure to transmit the evidence on which the 2-page November 13, 2023 "Return" deprive the appellant of meaningful judicial review?

Did the circuit court err in failing to evaluate newly discovered evidence that casts doubt on the City's prosecution of appellant?

Reply to Respondent's Statement of Case

Respondent's Brief is cogently argued, elegantly written, and it elucidates much common ground with Appellant. What it lacks is context, and context is paramount when Municipal Courts impose maximum allowable jail sentences on defendants. For example, Respondent contends on page 1: "The surrounding homeowners have complained about [Appellant's] use of the public streets as his personal parking and storage facility." There is much to analyze here. First, the parties are on common ground that Appellant cannot use public streets as his "personal parking and storage facility." No disagreement there. However, the controlling nuisance ordinance Respondent quotes on pages 1-2 specifically allows for "storage" of vehicles "retained for purposes of repair or towing storage on the premises of a properly zoned repair or towing facility. . ." As discussed more fully below, the entire record on which the Municipal Court relied in sending Appellant to jail consisted of nothing more than a Code Enforcement's opinion about photos he took without making the slightest inquiry as to whether any of the photographed vehicles were covered by the Court's oral Order. See Municipal Court Return quoted on Respondent's Brief at page 4. Before turning to the record, one more comment on context is necessary. The "surrounding homeowners" who allegedly complain consist of two individuals who do not live in the neighborhood, and at the originally scheduled trial of the case—before the Municipal Court *sua sponte* granted a mistrial over Appellant's objection—Appellant was prepared to call neighborhood residents who support Appellant's garage because it provides a lower cost repair option than can be obtained at automobile dealerships. Additional context is that the City has been trying to eliminate Appellant for years through various mechanisms—see the astonishing *"City of North Charleston vs. Harold Simmons,*" case number 2021-CP-10-02563, filed on June 3, 2021, by a Code Enforcement Officer! R.O.A. page ___.

Finally, the procedural context of this case remains confused. Respondent correctly points to the City's "Motion for Hearing," (Respondent's Brief page 4) but, again, as discussed more fully below, the Record is silent as to whether Appellant faced a Rule to Show Cause for allegedly violating an oral court Order or whether the parties were before the Court on a beyond a reasonable doubt criminal statute. (Context suggests it is the latter, but if it is the former, then the decision is controlled by an additional error of law for failing to include a means of purging contempt.)

Reply to Argument 1(A)—the Municipal Court's criminal jurisdiction does not permit indeterminate or lifetime sentences.

The Respondent asserts contradictory positions. On the one hand, Respondent asserts Appellant "mistakenly" relies on § 17-25-110, S. C. Code (Respondent's Brief at page 7) while simultaneously conceding "Research has not revealed a South Carolina case constructing Section 17-25-110." Instead of relying on the ordinary rules of statutory construction, Respondent grounds its authority as a 2002 Attorney General Opinion, which is spongy foundation at best. First, it is not an Attorney General's opinion: "This letter is an informal opinion only. It has been written[1] by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion." (David K. Avant letter dated October 28, 2002) Footnote No. 1 in Mr. Avant's letter supports Appellant's position and makes clear that the "without limitation" language of § 14-25-75 does not provide the authority to impose completely unlimited conditions on suspended sentences." Exactly. The Respondent's legal position is that the Municipal Court's suspended sentence lasts for the Appellant's lifetime, or at least an "unlimited" or indeterminate period is a self-refuting proposition.

[1] The passive voice is the curse of legal writing.

Rather than rely on an Assistant Attorney General's informal opinion, Appellant relies on the unambiguous rules of statutory construction. § 17-25-110, S. C. Code is a specific statute addressing a specific topic, and there is nothing remotely ambiguous about it. Appellant set out the rules of statutory construction in his Initial Brief at page 10, citing *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 341, 713 S.E.2d 278, 282 (2011) This legal principle carries the day especially when viewed against the background that this case is a criminal case in which the Municipal Court sentenced Appellant to the maximum period of confinement allowed by law. Every criminal defendant knows the maximum penalty he or she faces. Even juveniles who may be sentenced to indeterminate sentences know the potential maximum length of confinement immediately after being charged:

SECTION 63-19-1440. Commitment.

(B) All commitments to the custody of the Department of Juvenile Justice for delinquency as opposed to the conviction of a specific crime may be made only for the reasons and in the manner prescribed in Sections 63-3-510, 63-3-520, 63-3-580, 63-3-600, 63-3-650, and this chapter, with evaluations made and proceedings conducted only by the judges authorized to order commitments in this section. When a child is committed to the custody of the department, commitment must be for an indeterminate sentence, **not extending beyond the twenty-second birthday** of the child unless sooner released by the department, or for a determinate commitment sentence not to exceed ninety days. (emphasis added)

Looking at the controlling legal precedent in the light most favorable to the Respondent, the Municipal Court here imposed an indeterminate sentence on the Appellant, one which the Respondent argues is a lifetime sentence, or at least indeterminate. Appellant becomes the first criminal defendant in history to be under the South Carolina equivalent of double secret probation, a consequence the General Assembly specifically rejected in enacting § 17-25-110. Municipal Courts may have, as Respondent urges, "a great degree of discretion to impose appropriate punishment and to suspend sentences," (Respondent's Brief at page 7, citing *City of North Charleston v. Harper*, 306 S.C. 153, 410 S.E.2d 569 (1991)), but this discretion does not permit

Municipal judges to overrule the limitations the General Assembly put in place. The *City of North Charleston* makes that principle procedural bedrock. Lawyers of a certain age remember the *City of North Charleston* case striking the legal community like a thunderbolt, causing widespread celebration because the Supreme Court restrained the excesses of local government in criminal prosecutions, the metaphorical equivalent of a legal gravitational wave rearranging the criminal justice landscape. *City of North Charleston* struck down a North Charleston ordinance requiring Municipal judges to impose the maximum period of confinement without suspending any part of the sentence, the precise opposite of the City's position that a municipal judge can impose a lifetime obligation on a criminal defendant.

Reply to Argument 1(B)

Appellant had no idea why he was being hauled back into Court as the City's "Motion for Hearing" gave no identification of the alleged infraction.

The parties are in almost complete agreement on the substance of the Respondent's due process argument. Respondent is exactly correct: "the municipal court judge engaged in an extended colloquy with Appellant and his counsel to ensure that Appellant was freely and voluntarily entering the plea and understood the conditions of his suspended sentence and what he needed to do to avoid having to serve the jail sentence, including the need for him to provide repair parts orders or other documentation for any vehicles for which he was claiming the 'pending repair' exception in Section 9-67(4)(b)(1)." (Respondent's Brief at page 9) The verbatim transcript of that colloquy is found in the Record on Appeal at pages ___-____, and there is no more important component to this case. As the municipal judge made clear, she expected the Appellant to keep "inoperable" cars inside his garage and nothing outside that was not either capable of being driven or waiting for repair parts. Notwithstanding, the court sentenced Appellant to the maximum of 30 days based entirely on photographs with testimony that each one was "operable" and therefore in compliance with the Court's oral order. The circuit court erred in

refusing to set aside the sentence because the undisputed facts show: (1) the motion for hearing does not give even a hint of the allegation of how the Appellant failed to adhere to the municipal court's suspended sentence, and (2) the Code Enforcement Officer admitted he never stopped to inquire as to whether the cars were "inoperable" or whether they were waiting for parts, relying entirely on photographs. (This second failure is addressed in the next section.)

The City's September , 2024 "Motion for Hearing" is found in the Record on Appeal at pages ___-___, and the Court will see that it contains nothing approaching a meaningful identification of the alleged violation. In fact, it requests a "hearing" to determine if a contempt/imposition of sentence should be considered. Here is the City's entire identification of the issue it was calling Appellant upon to answer: "Upon knowledge and belief, the City submits that as of September 8, 2023, the defendant has not brought the property into compliance with the provisions of the Municipal Code." R.O.A. page ___[Motion for hearing] The motion is not dated, but the cover letter transmitting it is dated September 12, 2023, more than thirty days from August 9, 2023.

In a criminal case seeking to incarcerate a defendant for alleged noncompliance with a suspended sentence, it is difficult to know how to categorize such a motion. Whether it is similar to a Rule to Show Cause, an arrest warrant, or an indictment, the purpose of the pleading is to give notice to a target of the allegations he must meet, and whether it is governed by *Rules of Civil Procedure* or *Rules of Criminal Procedure*, it must provide specific notice. "An application to the court for an order shall be by motion which . . . shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." *S. C. Rules of Criminal Procedure*, Rule 4. The same rule applies in civil cases. See Rule 7(b), *S. C. Rules of Civil Procedure*. See *Lucey v. Meyer*, 401 S.C. 122, 736 S.E.2d 274 (Ct. App. 2012):

"Rule 7(b)(1), *SCRCP* requires that motions 'shall state with particularity the grounds therefor, and shall set forth the relief or order sought.' " *Camp,* 386 S.C. at 575, 689 S.E.2d at 636. "The particularity requirement 'is to be read flexibly in recognition of the peculiar circumstances of the case.' " *Id.* (quoting *Cambridge Plating Co., Inc. v. Napco, Inc.*, 85 F.3d 752, 760 (1st Cir.1996)). " 'By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly.' " *Id.* (quoting *Calderon v. Kansas Dep't of Soc. & Rehab. Servs.,* 181 F.3d 1180, 1186 (10th Cir.1999)). However, when neither party is prejudiced and the court is able to deal fairly with a motion for reconsideration, applying an overly technical application does not serve the purpose of Rule 7(b)(1), *SCRCP*. *Id.* at 575-76, 689 S.E.2d at 636-37.

Here, Respondent reduces due process to the right to be heard and glosses over the notice requirement by harkening back to the colloquy with the Municipal Court on August 9, 2023. The August 9th detailed colloquy with the Court directed Appellant to keep "inoperable" cars inside and said absolutely nothing about a car with a flat tire or the Appellant's personal vehicle, which happens to be missing a bumper. The City is casual with notice requirements for incarcerating its citizens, and it is a gross injustice to affirm a 30-day sentence because of photographs of a car with a flat tire and Appellant's personal vehicle, which has never been the subject of any court order.

Reply to Argument 1(C)
There is not a scintilla of evidence in this Record that the vehicles photographed by the City's Code Enforcement Officer were "inoperable."

Once again, the facts of this case are not in dispute, yet the parties draw mutually exclusive conclusions from undisputed facts. As the November 13, 2023, Magistrate's Return (R.O.A. page ___) establishes, the sole evidence against the Appellant were photographs taken by a Code Enforcement Officer who passed Appellant's garage without making any inquiry as to the status of the vehicles he photographed. Here there is genuine disagreement even though it is indisputable that the City's sole evidence consists of photographs of Appellant's personal vehicle missing a bumper and a customer's car with a flat tire. (See Record on Appeal pages ___-____ for City's photos.) Respondent also contends Appellant failed to provide a sufficient record for this Court

to review the decision misplacing its reliance on Rule 207 of the *S. C. Appellate Court Rules* and *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997)

First, Rule 207 places a duty on appellants to order a transcript timely from a court reporter. There is no court reporter in a municipal court. Second, *Goode* makes clear that the record must be sufficient to allow a reviewing court to make a determination, and this record is sufficient because the Magistrate's November 13th return makes clear that the Court sentenced appellant to thirty days of incarceration based on "photos [of] several vehicles on the Defendant's property, which all appeared to be inoperable." (R.O.A. page ___[Magistrate's Return at page 2] The testimony was nothing more than the Code Enforcement officer testifying he took the photos. He also testified he made no effort to speak to Appellant, and Appellant testified the vehicle missing a bumper was his personal vehicle. A photograph without further evidence proves nothing more than a photograph of a shopper carrying a loaf of bread near a grocery store is evidence of shoplifting. The Appellant provides a sufficient basis for the Court to reverse the decision below because this record does not come anywhere close to the beyond a reasonable doubt standard of a criminal case or even the clear and convincing standard of a Rule to Show Cause. Before courts incarcerate citizens, it is the prosecutor's duty to provide a sufficient record, especially where the allegation is a putative violation of an unwritten Order. A criminal defendant is not required to provide any evidence, and as discussed in the next and final section, the City of North Charleston has a long history of being openly contemptuous of the rules governing the conduct of government officials. (One of the reasons the Court's 1991 decision in *City of North Charleston v. Harper* made such an impact in the LowCounty is because the prosecutor in that case was long suspected of misusing law enforcement to harass citizens. In fact, twenty years earlier, the City of North Charleston attempted a judicial coup by throwing the Charleston County Magistrates out of the City. See *Bourne v. Graham*, 260 S.C. 554, 197 S.E.2d 674 (1971) Recent events even brought a

well-publicized visit from the F.B.I. However, the City's current legal team is an incalculable improvement over the City's prior history of questionable conduct. As discussed in the final section, North Charleston's bending the rules is not a new phenomenon.

Finally, Respondent argues on page 12 that ". . . under the terms of the Ordinance 9-67(4), the municipal court found that these conditions along with the other evidence and testimony (including Appellant's own testimony) at the October 6, 2023 hearing, reflected that Appellant had failed to comply with the safety and nuisance standards defined by Ordinance 9-67(4)." Whether that is true or not is irrelevant to this appeal. The City was not hauling Appellant back into Court to relitigate the Ordinance; it was hauling him back into Court to ascertain if he did or did not comply with the Court's unwritten order of August 6, 2023. A few photographs are legally insufficient to meet the evidentiary standard to incarcerate the Appellant, especially where the City demanded Appellant conform to an oral Order that has never been reduced to writing. If the Appellant has the burden to provide a sufficient record, then the City has the burden of furnishing sufficient notice to both the Appellant and a reviewing Court as to which provision the City contends the Appellant failed to adhere. The Appellant's rights were irredeemably prejudiced by the lack of notice in both the oral Order and the complete absence of specificity as to which provisions of an oral Order he allegedly violated.

Reply to Argument 1(D)
The City's blatantly unlawful activity in allowing a Code Enforcement Officer to file pleadings taints the entire process.

The unlawful filing is in the Record on Appeal at page ___. It speaks for itself, and as set forth above, the City of North Charleston has a history of judicial subterfuge. The only reference to the "housing" case is a discussion on page 9, line 23 of the transcript (R.O.A. page __) in which the City prosecutor informs the Court that in exchange for the *nolo* plea, the City is dismissing a housing "warrant." Whatever that case is, it is in the Record on Appeal at page ___, and the Court

can review it and draw its own conclusions. The only point Appellant wishes to make about this case is that it demonstrates a daring (to choose a non-pejorative term) gambit and establishes the Code Enforcement Department's willingness to deploy improper process in an unlawful manner. Such techniques are in vogue these days at every level of government, testing the judicial branch to its limits. The point is that had Appellant been aware of the City's unlawful filing, that evidence would have destroyed the credibility of the Code Enforcement officer who took photos and gave his opinions about what they meant. As Respondent concedes, the Municipal Court weighed the credibility of Code Enforcement, which the unlawful filing would have eroded, and Appellant was prejudiced by not being aware of it. See Rule 608(c) *S. C. rules of Evidence*. It certainly explains why Code Enforcement declined to speak to Appellant to inquire if the vehicles he photographed were or were not "operable" or were awaiting parts.

Conclusion

The City should never have brought these criminal citations 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, 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 issued an unwritten Order, requiring 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 ended. 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 is obviously unlawful and evidence of bias. 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 City 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,

May 6, 2025

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