THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
COURT OF GENERAL SESSIONS

Edward B. Cottingham, Sr, Circuit Court Judge

Case No. 2012GS3201004

THE STATE, ... Respondent,

v.

BRIAN CURTIS MACK . . . . . Appellant.

Amended Explanation of Reviewable Issues on Appeal

Appellate Rule 203(d)(1)(B)(iv) requires any appeal from a guilty plea or nolo contendere plea shall contain the following explanation:

(iv) If the appeal is from a guilty plea, an Alford plea or a plea of nolo contendere, a written explanation showing that there is an issue which can be reviewed on appeal. This explanation should identify the issue(s) to be raised on appeal and the factual basis for the issue(s) including how the issue(s) was raised below and the ruling of the lower court on that issue(s). If an issue was not raised to and ruled on by the lower court, the explanation shall include argument and citation to legal authority showing how this issue can be reviewed on appeal. If the appellant fails to make a sufficient showing, the notice of appeal may be dismissed;

Broken down, the rule requires the Appellant to provide the following explanation as a supplement to the Notice of Appeal:

1. " . . . a written explanation showing that there is an issue which can be reviewed on appeal."

2. "This explanation should identify the issue(s) to be raised on appeal and the factual basis for the issue(s) . . . ."

3. And the explanation of issues must show the factual basis of the issues "including how the issue(s) was raised below and the ruling of the lower court on that issue(s).

4. "If an issue was not raised to and ruled on by the lower court, the explanation shall include argument and citation to legal authority showing how this issue can be reviewed on appeal."

Issue No. 1

The Defendant's agreement to a guilty plea, accompanied by a nolo contendere plea on the charge of 2nd degree assault on a child, was based upon an understanding that the 11th Circuit Assistant Solicitor would indicate to the court that she was "not opposed to the court sentencing the Defendant to probation."

Although the Assistant Solicitor indicated that the Edgefield County Assistant Solicitor had stated that he was not opposed to probation on the fraud charge for cashing two fraudulent checks based upon the fact that the Defendant had already served more than eight months in jail, the Lexington Assistant Solicitor refused to make a similar statement about the Lexington charges. Counsel for Defendant argues that this failure was contrary to the agreement between counsel, and was highly prejudicial to defendant.

Issue No. 2 and No. 3

The second issue that is raised is the ruling of the trial judge which prohibited the

Defendant from submitting any information pertaining to the 2nd degree assault charge. Probably the most harmful action by the lower court was the judge's clear instruction that "he did not want to hear any evidence about the assault."

This ruling prevented Counsel for Defendant to present very telling evidence about the need for a nolo contendere plea on that charge. This issue was raised in the motion for reconsideration. The court denied this motion, but did not make a specific ruling on the two issues raised above. See Motion and Denial attached as Exhibit "B". The motion to reconsider was supplemented by attaching the two e-mails traded by counsel which support the one-page memo on facts which had been sent to the Lexington Assistant Solicitor. Exhibit "A". This memo proves that the Prosecutor knew that two witnesses, including the mother of the State's key witness (the mother's rebellious 17 year old daughter), stated the position that supported the nolo contendere plea, and took the position that there was no physical assault by the Defendant who was never alone with the child on the shopping trip.

This evidence suggested that it was impossible for the Defendant to have committed the assault crime, and this assertion was sent to the Lexington Assistant Solicitor as part of the factual memo on the case. Based on the evidence available to counsel for Defendant, a straight plea on the assault charge would have been perjury on the part of the Defendant.

This situation denied counsel for the Defendant the opportunity to make this key defense argument at the plea hearing. This denial was very prejudicial and harmful to Defendant, and alone is sufficient basis for an appeal of his nolo contrendere plea.

Issue No. 4

Although counsel for Defendant believes that the prohibition against evidence of the assault (which would have been the factual memo, Exh. "A") was not submitted as part of the trial record, it was attached to the motion for reconsideration, and as such made a part of the appeal record. The trial court ruled on this issue by denying the motion with the argument that the plea was fair and the sentence was appropriate.

In addition, Counsel would cited several cases which suggest that this critical issue is an appealable issue; ***The STATE,* Respondent, *v. David Earl THOMPKINS and Clairborne C. Clarke,* Appellants, 211 S.E.2d 549 (S.C. 1975); *In the Interest of Justin B., a Juvenile Under the Age of Seventeen*, Appellant, Appellate Case No. 2010-151466, (S.C.** 27306), **and *Bobby KIBLER*, Appellant, v. *STATE of South Carolina*, Respondent, 227 S.E.2d 199 (S.C. 1976).**

Counsel of Defendant respectfully argues that a denial of justice occurred in the plea of Brian Curtis Mack, in the Court of General Sessions for the 11th Judicial Circuit on July 10, 2013.

Orin G. Briggs SC Bar # 883
Attorney for Appellant
240 Heritage Trail
Lexington, SC 29072
803/957-4383
e-m: ogb-atty@sc.rr.com

November 22, 2013

Brian Curtis Mack
253 Glover Road
Pelion, SC 29123

Michelle Cannon
133 Yorkshire Ct.
Leesville, SC 29070
529-2956

Sept. 13, 2012 arrest, the "incident" is alleged to have happened in July, 2012

complaint by Mieshia Charmick Jennings, Michelle's daughter DOB: 11-28-95

Child: Omya Cannon 3 years old at time

CSC 1st degree, child under the age of 11
Fondled her and penetration

Michelle says that Brian was never alone with child or if he was near the child, Michelle was there also.

Daughter, Mieshia Charnick Jennings filed complaint

She is opposed to mother marrying Brian; daughter often falsely complained about Brian She has flitted with Brian and she and girlfriend have had sex with adult men -- at least six different men.

The alleged facts are that the family was shopping in Goody's in Leesville and then they all went to the front of Goodwill. They did not have a car, but was to be picked-up by another family member.

Daughter claims that the baby went around the corner of Goodwill and Brian followed her. The baby (3 year old) told Mieshia that Brian had fondled her and had put his hand in her panties and put his finger in her private parts.

Michelle tells attorney that at no time was Brian out of her site "except when he left Goody's to go out and smoke; all others were still in Goody's."

You have two adults telling a true story, and two rebellious teenagers telling what appears to be a made-up story, with no physical evidence to support.

Given the chance, I could come up with an alternative charge and plea. We need to talk about a reasonable bond for this and forgery charge.

Orin Briggs

Exhibit "A"

Orin Briggs

From: <DONOTREPLY@LEX-CO.COM>
Date: Friday, August 02, 2013 3:50 PM
To: <ogb-atty@sc.rr.com>
Attach: 2012A3220200028_ORDER_210837.PDF
Subject: order

Exhibit "B"

8/9/2013

ORIGINAL

FILED
2013 JUL 25 AM 10: 16
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF GENERAL SESSIONS
FOR THE 11TH JUDICIAL CIRCUIT

State of South Carolina,

vs.

Brian Mack,

Defendant.

Case No.: 2013-GS-32-1012 1004
2012A3200200002 8

ORDER DENYING DEFENDANT'S MOTION TO ALTER SENTENCE IN GUILTY PLEA PURSUANT TO RULE 59

The Court heard this guilty plea in Lexington County on July 10, 2013. After waiving presentment to the grand jury and waiving his constitutional rights, the defendant freely and voluntarily entered a plea of nolo contendere to assault and battery second degree. The defendant was sentenced to 18 months suspended on time served. Additionally, after waiving his constitutional rights, the defendant freely and voluntarily entered a plea of guilty to financial transaction card fraud. The defendant was sentenced to 5 years, with credit for time already served. Finally, after the defendant waived his constitutional rights, he freely and voluntarily entered a plea of guilty to financial transaction card fraud in Edgefield County to which he was sentenced to a concurrent 5 year sentence, with appropriate restitution ordered. In exchange for these pleas, the solicitor agreed to dismiss several other financial offenses in Lexington and/or Edgefield counties.

On July 12, 2013, counsel for the defendant filed a written motion to alter sentence in guilty plea pursuant to Rule 59. Defense counsel suggests that the Court misunderstood the defendant's prior record when sentencing the defendant. However, after reviewing defense counsel's written arguments, and personal notes taken, the Court maintains that given the several financial offenses to which the defendant specifically entered a plea of guilty, the imposed sentence is appropriate. For the same reasons specified on the record during the qualification and acceptance of the guilty plea, the Court denies defendant's motion. After reviewing personal notes from the July 10, 2013 guilty plea, oral arguments will not be necessary in this matter.

Therefore, defendant's motion to alter sentence in guilty plea is DENIED.

IT IS SO ORDERED.

Edward B. Cottingham
Presiding Judge

July 23, 2013
Lexington, South Carolina

SAD

STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS

COUNTY OF LEXINGTON)

THE STATE,) MOTION TO ALTER SENTENCE

V.) IN GUILTY PLEA PURSUANT TO

BRIAN MACK) RULE 59

MOTION TO MODITY THE SENTENCE IN the above captioned case before Judge Edward B. Cottingham, Sr., based upon an apparent misunderstanding about the Defendant's record on fraudulent money transactions,

In reality, the Defendant was charged with only two separate illegal money transaction (one has two separate transactions); one in Edgefield County with a forged check, and two uses of a credit card he found in Lexington County and used illegally twice in Batesburg. These were criminal, but they did not show a pattern of a long history of money thefts. There was no need for restitution in the Lexington credit card case because his co-defendant was ordered to pay restitution in that case, and the co-defendant was sentenced to one year.

The biggest problem for counsel was his total surprise when the court suggested that Brian Mack had a long history of fraudulent money thefts from numerous citizens of the state. The fact is, as evidenced by this rap sheet, is that these two fraudulent thefts are the only two he has committed, and they were done in a short span of time when he was unemployed, yet they are inexcusable.

FILED

2013 JUL 12

In order to report the criminal record accurately, Counsel should note that Brian Mack was charged and convicted of numerous drug charges from 1990 to 2004 and four Larceny crimes in 2003; the rest of the charges were unauthorized use of vehicles and driving without a license several times, there were several other misuse of vehicle charges in 2010, and then a break until these current charges. Yes, this is not a pretty record, but he has already spent more than 14 years in prison. I respectfully suggest that a 5 year sentence suspended on the service of 18 months or 2 years, with credit for time served and 3 years probation might be a more successful sentence in teaching Mr. Mack that we all have to obey the laws of the land or suffer the consequences.

I have attached 2 e-mails-- one about counsel's reaction to the 5 year sentence and the note that the Assistant Solicitor is willing to cooperate in my effort to get a reconsideration of the sentence.

Counsel respectfully requests an appropriate reduction in the sentence for Brian Mack based upon the fact that the Defendant did not have a long history of fraudulent thefts of money and the total absence of any credible evidence of the alleged sexual assault on the small child.

IT IS SO MOVED,

Respectfully submitted,

Orin G. Briggs
SC Bar # 883

July 11, 2013

Orin Briggs

From: "Davis, Shannon" <sadavis@lex-co.com>
Date: Wednesday, July 10, 2013 3:56 PM
To: "Orin Briggs" <ogb-atty@sc.rr.com>
Cc: "Hubbard, Rick" <RHubbard@lex-co.com>
Subject: RE: reason for last e-mail

Orin,

I don't know where Judge Cottingham got the idea of the history of stealing, but it is likely from the charges he pled to as well as the 4 financial charges that were dismissed in exchange for his plea. I did state that as to the Edgefield charge, Mr. May was not opposed to time served. I advised you that as to the Lexington charges, I would be neutral as to sentencing, which I was.

I know Judge Cottingham will be holding plea court tomorrow, so he will be here. You are welcome to contact his law clerk, Trey, to see if he would like to meet with us, but I would imagine he would rather you file a motion and have it heard on the record.

I believe I held up my end of our agreement and if I had read his rap sheet, it is likely he would have received more time since he has a very bad record. Let me know if there is anything else that I can do for you. Thanks.

Shannon A. Davis
Assistant Solicitor
Eleventh Judicial Circuit
Lexington, South Carolina
(803) 785-8719
sadavis@lex-co.com

From: Orin Briggs [mailto:ogb-atty@sc.rr.com]
Sent: Wednesday, July 10, 2013 3:51 PM
To: Davis, Shannon
Cc: Hubbard, Rick
Subject: reason for last e-mail

Shannon, I was shocked at the sentence for Brian Mack. Two questions are raised: where did Judge Cottingham get the Idea that Brian had a long history of stealing money from citizens since you did not recite his rap-sheet. The second is my fault because I thought we agreed for you to say that the Solicitor's office was not making a recommendation on the length of the sentence, but I thought we agreed that you would add that you were not opposed to him getting time served. I say my fault because this last point was not in writing, and it is too late to be debated now.

I wonder if Judge Cottingham remembered Brian from an earlier appearance.

This is a request for a special effort on your part; you have not obligation to assist me in requesting the judge to reconsider his sentence.

I guest the first question is will Judge Cottingham be here on Thursday so I could ask for a bench conference with him?

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THE STATE, ... Respondent,

v.

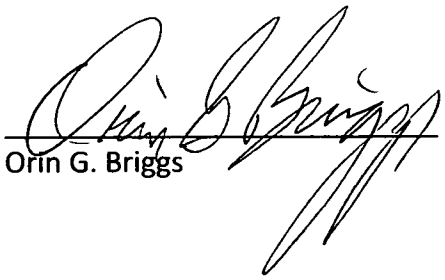
BRIAN CURTIS MACK . . . . . Appellant.

The undersigned, Counsel for the Appellant, duly served by hand delivery a copy of the Amended Explanation of Reviewable Issues on Appeal on the opposing counsel of record, the presiding trial judge and the State Court of Appeals at the following addresses:

The Court of Appeals
1015 Sumter Street
Columbia, 29201

Shannon Davis
Assistant Solicitor
P.O. Box 874
Lexington, SC 29072

Judge Edward Cottingham, Sr.
7A Exum Drive
W. Columbia, SC 29169



Orin G. Briggs

November 22, 2013