

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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JAN 06 2014

APPEAL FROM LEXINGTON COUNTY
J. Michael Baxley, Circuit Court Judge **SC Court of Appeals**

Indictment Nos. 2011-GS-32-0242
2011-GS-32-0243
2011-GS-32-0244

EX PARTE:

South Carolina Department of Disabilities
and Special Needs, Appellant.

IN RE:

State of South Carolina, Respondent,

v.

Rocky A. Linkhorn, Respondent.

**RETURN TO PETITION FOR WRIT OF
SUPERSEDEAS OR STAY PENDING APPEAL**

Respondent Rocky A. Linkhorn, by way of return to the appellant's Motion for Writ of Supersedeas or Stay Pending Appeal, would oppose the motion and submit the following to the Court:

1. This is not a proper case for issuance of a writ of supersedeas or stay pending appeal.

The appellant's petition for a writ of supersedeas or a stay of judgment is moot. This appeal is from an order issued by the Court of General Sessions for Lexington County. Judgments in criminal cases are stayed upon the filing of a notice of intent to appeal, except in matters concerning terms of incarceration. Rule 246(a), SCACR. Even if the Court considers this appeal to be civil in nature, the filing of a notice of intent to appeal automatically stays execution of the lower court's order unless the order falls within certain statutory exceptions or court rules. Rule 241(a), SCACR. *See State v. Cooper*, 342 S.C. 389, 536 S.E.2d 870 (2000). The order in this case does not fall within an exception. *See*, Rule 241(b), SCACR. The Court should dismiss the petition on this basis.

2. The appellant is barred from seeking a writ of supersedeas or stay of judgment because it did not first seek relief in the circuit court.

A party requesting a stay or supersedeas pending appeal must first seek relief from the lower court. Rule 241(d)(1), SCACR. The South Carolina Appellate Court Rules require this unless "extraordinary circumstances" make it "impracticable." *Id.* Issuance of *ex parte* orders or unnecessary delays in the lower court are circumstances deemed "extraordinary" by Rule 241. *Id.*

Judge Baxley's order was filed September 17, 2013. Even though more than three months have passed, the appellant has not filed a motion to reconsider the

court's order pursuant to Rule 29, SCRCrimP, or Rule 59(e), SCRCP, nor has it sought supersedeas in the circuit court. Instead, the appellant improperly addressed its motion for writ of supersedeas or stay pending appeal directly to this Court.

The appellant claims that extraordinary circumstances exist because the lower court's order affects "countless others." It implies that the court's order applies to all persons committed to receive its services after being found incompetent to stand trial. In fact, the order pertains to a small subset of criminal defendants. It affects persons with an intellectual disability, as defined in S.C. Code Ann. §44-23-10, whose cognitive impairments arose after the age of 22. That is the crux of this appeal: must the appellant offer involuntary commitment services to criminal defendants found incompetent to stand trial whose intellectual disabilities arose after the age of 22?

The appellant submits the affidavits of two of its employees, David Goodall and Steve Von Hollen, in support of this petition. The affidavits belie the appellant's claims that the lower court's order affects "countless others." Mr. Goodall's affidavit states that the overall number of persons who receive DDSN services as a result of a finding of incompetence to stand trial is small. On average, only 49 of the appellant's clients are found incompetent to stand trial each year. Of these, less than two are found to need services provided in a secure facility on an annual basis. Overall, the appellant provides services to 159 people found

incompetent to stand trial. Only seven of them are housed in secure facilities. This number includes respondent Linkhorn. The appellant did not provide information, either at the hearing or to this Court, of the number of people who might fall within the subset affected by the court's order. It also did not submit evidence that persons falling in this group are more likely to need placement in a secure facility. Respondent Linkhorn submits the appellant will be required to provide services to a small number of new clients as a result of the court's order.

The appellant alleges it will suffer a fiscal disaster due to the lower court's ruling. This claim rests on a misinterpretation of the court's order. Judge Baxley's order did not direct the appellant to immediately house its existing clients in prison-like facilities. Nor did it conclude that all persons in the subset that includes respondent Linkhorn must be treated in this setting. The appellant argued at the hearing that it does not operate secure facilities. (App. 11, ¶3). In response to this argument, the court directed the appellant to "provide for the development of secure facilities as *necessary* . . . or . . . provide funds and *necessary* contractual arrangements to henceforth house such defendants in secure facilities operated by other entities." (App. 18, ¶4) (emphasis added). In making this ruling, the court sought to ensure the appellant will provide secure facilities if future patients in the same class as respondent Linkhorn are deemed suitable for such placement. It did not dictate this placement to the exclusion of all others.

The appellant also claims that the court's order abrogates the legal and civil rights of a large number of persons. This is not the case. Only respondent Linkhorn is affected by the court's order at this time. The court ordered him held at a secure facility pending the filing and disposition of an involuntary commitment proceeding pursuant to S.C. Code Ann. §44-20-450(A)(8). The court did not rule that this placement is permanent. The Eleventh Circuit Solicitor's office was ordered to file the appropriate petition in probate court, and this has been done.¹ The need for respondent Linkhorn's placement at GeoCare would most likely be obviated if the appellant accepted involuntary commitment of him, assessed his needs, and found an alternative placement. Affiant Steve Von Hollen is of the opinion that respondent Linkhorn will most likely best be served in a Community Training Home II rather than a secure facility. Nothing in the court's order prohibits this placement if made in the context of an involuntary commitment proceeding. The order does not take away the rights of the respondent or of others similarly situated under S.C. Code Ann. §44-23-430 and §§44-26-10, *et seq.*

The appellant also argues that extraordinary circumstances exist because the circuit court's jurisdiction to issue its order was "highly questionable." Respondent Linkhorn submits that this issue is better addressed by the Court on the merits

¹ Counsel for respondent Linkhorn is advised by the Lexington County Probate Court that his case was transferred to the Darlington County Probate Court. That court declined to provide information about the status of the case, citing privacy concerns. See, S.C. Code Ann. §44-22-100.

rather than at this juncture of the proceedings. Notably, the appellant did not raise these jurisdictional arguments in the court below; therefore, the argument is not preserved for appellate review. The only jurisdictional defect alleged in its return to the rule to show cause was that jurisdiction was still in the probate court and the appellant had a pending motion to dismiss in that forum. *See Return to Rule on Behalf of South Carolina Department of Disabilities and Special Needs* (App. 49-50).

The appellant now raises a plethora of procedural bars to the merits of this case in support of its petition for a writ of supersedeas. It points to alleged defects in the rule to show cause. It complains of lack of notice. Concerning notice, Respondent Linkhorn directs the Court's attention to Attachment A appended hereto. Attachment A is a letter from Judge Baxley to counsel for all parties, dated April 12, 2013, outlining the issues that would be addressed at the hearing. *See Attachment A*. The appellant also questions the validity of Justice Toal's order vesting jurisdiction of this case with Judge Baxley. It raises subject matter jurisdiction assertions which go beyond those arguably set forth in its return to the rule to show cause. The appellant goes on to insinuate that ex parte communications occurred between the probate court and the solicitor's office.

None of these issues were raised in the court below and this Court should not consider them now. They are matters to be addressed after receipt of the

transcript, briefing, and argument before the Court. The Court should not consider them in ruling on this petition, especially when the appellant had three months to raise them in a motion to reconsider, a Rule 59(e) motion, or a petition for supersedeas or stay in the circuit court. *Cf.*, *Burgess v. State*, 402 S.C. 92, 738 S.E.2d 264 (Ct.App. 2013) (state's failure to file Rule 59(e) motion asking lower court to make specific finds of fact or conclusions of law barred review on appeal); *Smith v. State*, 404 S.C. 493, 745 S.E.2d 378 (Ct.App. 2012) (post-conviction relief applicant's failure to raise allegation in lower court or make motion to alter or amend judgment precluded appellate review); *Van Ness v. Eckerd Corporation*, 350 S.C. 399, 566 S.E.2d 193 (Ct.App. 2002) (if relief is granted which was not presented to the lower court, aggrieved party must move to alter or amend judgment to preserve issue for appellate review).

The crux of the appellant's argument seems to be that the circuit court's ruling was unfavorable, it was unlikely to be revised, and this, alone, should excuse the its failure to follow the procedure prescribed in Rule 241(d)(1). Yet there is nothing extraordinary about a party to litigation being aggrieved by an adverse judgment. Those so aggrieved might assume that the court will be unwilling to amend its order. This assumption does not, however, relieve the litigant from its duty to adhere to the rules of court. Because the appellant has not done so, it is not entitled to have this Court hear its petition for supersedeas.

3. The Court should not rule on the appellant's petition because the appellant has a pending motion to transfer this case to the South Carolina Supreme Court.

The appellant filed a Motion for Transfer of Case to South Carolina Supreme Court on December 17, 2013. Respondent Linkhorn will not oppose this motion and will file a return to this effect at the same time this document is filed. On information and belief, after discussions with counsel for the other respondent, the State will not oppose this motion. As all parties appear to agree that the South Carolina Supreme Court should certify this case, a ruling on the petition for supersedeas at this time might be a waste of judicial resources. The court that addresses the merits of the case should be the forum that rules on the motion for supersedeas. Respondent Linkhorn asks the Court to defer ruling on the motion until jurisdiction of the appeal is settled.

Conclusion

The appellant asks the Court to stay execution of the lower court's order in toto pending resolution of this appeal. As discussed above, this is unnecessary because the appellant misconstrues the scope of the order. Only respondent Linkhorn is affected by its provisions at this time.

The appellant concedes that it is willing to pay for Mr. Linkhorn's placement at GeoCare until the appeal is resolved. Respondent Linkhorn would ask the Court to allow the involuntary commitment proceedings pending in Darlington County to

go forward. If Steve Von Hollen's assessment of the respondent's treatment needs is correct, then disposition of the probate petition will obviate the need for housing at Geocare.

Respondent Linkhorn is in an unenviable situation. He has pending charges for serious felonies in the Court of General Sessions for Lexington County. He is incompetent to stand trial. He is indigent and cannot afford to pay bond. Due to the nature of his charges, a personal recognizance bond is a practical impossibility. If he is not housed at GeoCare, he will be returned to the Lexington County Detention Center in violation of S.C. Code Ann. § 44-23-220. Hence, if the Court will not allow the Darlington County probate proceedings to go forward, respondent Linkhorn asks that the appellant be compelled to continue to house him at GeoCare.

Respectfully submitted,



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Defender
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(803) 785-8873

Counsel for Rocky A. Linkhorn

Lexington, South Carolina
January 6, 2014



State of South Carolina
The Circuit Court of the Fourth Judicial Circuit

J. MICHAEL
BAXLEY
JUDGE

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April 12, 2013

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In Re: State v. Linkhorn, 2011-GS-32-0242, 243, 244 (CSC, Lewd Act, Obscenity)

Counsel:

As a follow-up to recent telephone conferences with prosecution and defense counsel on the above listed cases, please accept this communication as an effort to outline the Rule to Show Cause (RTSC) issues that the Court perceives to be at bar in State v. Linkhorn. So that all counsel will be of the same understanding, this letter is also addressed to general counsel for both SCDMH and SCDDSN, and formal notice is hereby provided to those agencies that this case has been assigned to this office for disposition. A copy of Justice Toal's Order is enclosed. So that all witnesses will understand the nature of the proceeding, the Court has no objection to your sharing this correspondence with any expert witnesses you intend to call. Also set forth below is a brief discussion of the anticipated evidence necessary for a decision on each issue.

At the RTSC hearing, the Court will seek to decide the following issues:

1. **What is the primary condition that has rendered Defendant not competent and not likely to restore as found by Judge Keesley on November 2, 2011?**

This medical decision will determine what agency is eventually charged with the treatment and care of the Defendant. Evaluation reports from both DDSN and DMH examiners are already in the record. Those

ATTACHMENT A

reports can be used as evidence even if the original examiners do not appear at the RTSC hearing [See SC Code 44-23-410(2)]. Because competency is not necessarily static (even with an intellectual disability), and out of fairness to the agencies, both agencies should be given the opportunity to re-examine Defendant if they wish. It is anticipated that defense will retain an independent expert on this issue, and it is the Court's understanding that defense has contacted Dr. Richard Frierson for this purpose.

- 2. If the medical evidence is not dispositive as to which condition is primary with respect to Defendant's current lack of competence, then the Court must determine by a preponderance of the evidence which agency can best provide care and treatment for the Defendant, and/or whether the services of both agencies would be beneficial to Defendant.**

In a voluntary admission setting, the agencies themselves determine who is eligible for hospitalization or services (for SCDMH, see 44-17-310; for SCDDSN, see 44-20-390(C)). The agencies serve as gatekeepers because agency intake staff and examiners know best the treatment and care options and modalities available through the particular agency. For involuntary admission such as this case, particularly where the agencies contest the commitment, evidence must be offered as to what treatment/care options beneficial to Defendant are available through a particular agency; what treatment/care goals are believed to be achievable by that agency with Defendant based on his level of cognition and/or illness; the ability of the agency to manage and control Defendant and at the same time protect the security needs of the general public and specific prior victims; and, all other factors counsel deems necessary to this decision.

- 3. In the event the Court concludes that DDSN is an appropriate agency for Defendant's care either entirely or in part, the Court will then consider whether DDSN's interpretation of the statutory term "intellectual disability or related disability" to exclude Defendant and others with brain injuries is permissible (See S.C. Code Ann. § 44-23-410 et. seq.).**

This decision is both medical and legal. Defense and prosecution counsel are encouraged to be prepared to argue this issue as it relates to this specific case. For a systemic discussion of this issue, its history in South Carolina jurisprudence, and the ramifications for defendants and stakeholders, the Court intends to call an expert witness, who is hereby disclosed to be Beattie I. Butler, Esquire, of the Charleston County Public Defender's office. A letter requesting Mr. Butler's involvement in this case is attached.

4. Discovery.

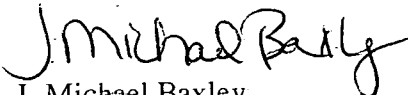
Court Administration has already determined this RTSC to be complex. While formal discovery beyond Brady and Rule 5, SCCrimP, is uncommon in General Sessions matters, the Court is specifically authorized to issue such discovery "orders as are appropriate" [See Rule 5(d)(1)]. Due to the potential import of this decision, and the possibility of appellate review, the Court is willing to issue an order permitting depositions of forensic examiners, agency staff, and other expert witnesses. Out of fairness, counsel for the agencies will be permitted to fully participate in any such depositions, and even issue notices of such depositions that they deem necessary. No deposition of the Defendant will be permitted as he has been determined not competent.

5. Scheduling.

Counsel is requested to prepare a consent scheduling order, with the input of counsel for DMH and DDSN as well as expert witness Butler, setting forth all deadlines and timelines for this matter, including a date certain for trial. It is expected that this case will be expert-intensive, and the Court recognizes that medical forensic examiners have pressed schedules that involve duties necessary to the treatment of many individuals and the orderly progression of statewide forensic operations of the General Sessions courts. Thus, it is anticipated that ample time will be needed to accommodate the various schedules involved; however, by the same token, the Court is aware that the Defendant is currently incarcerated in the Lexington County Detention Center, which is not an appropriate place for care and treatment of a mentally ill and/or intellectually disabled individual.

I ask that you, together with agency counsel, prepare a scheduling order and submit it electronically to this office (jbaxleylc@sccourts.org) within thirty (30) days of the date of this letter. Please do not hesitate to contact me should you have any questions or comments, and thank you for your attention to this matter.

Sincerely,


J. Michael Baxley
JMB/jc

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
J. Michael Baxley, Circuit Court Judge

Indictment Nos. 2011-GS-32-0242
2011-GS-32-0243
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JAN 06 2014

EX PARTE:

SC Court of Appeals

South Carolina Department of Disabilities
and Special Needs, Appellant.

IN RE:

State of South Carolina, Respondent,

v.

Rocky A. Linkhorn, Respondent.

CERTIFICATE OF SERVICE

The undersigned, Elizabeth C. Fullwood, of the Eleventh Circuit Public Defender's Office, attorney for the respondent Rocky A. Linkhorn, does hereby certify that service of the below listed documents in the above captioned matter was made on all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below addresses clearly indicated on said envelopes this 6th day of January 2014:

1. Return to Petition for Writ of Supersedeas or Stay Pending Appeal.
2. Return to Motion for Transfer of Case to South Carolina Supreme Court

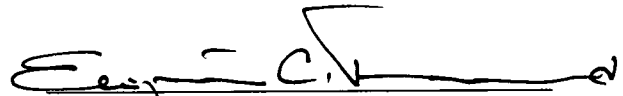
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January 6, 2014

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January 6, 2014

RECEIVED

JAN 06 2014

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia SC 29211

HAND-DELIVERED

Re: Ex parte: South Carolina Department of Disabilities and Special Needs
In Re: State of South Carolina v. Rocky A. Linkhorn
Appellate Case Number: 2013-002208
Indictment Numbers: 2011-GS-32-0242, 2011-GS-32-0243, 2011-GS-32-0244

Dear Ms. Kitchings:

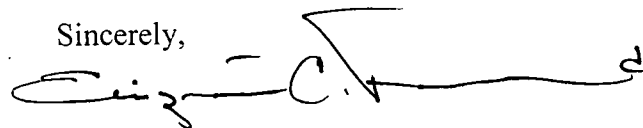
Enclosed for filing are the original and seven (7) copies of the following: (1) Return to Petition for Writ of Supersedeas or Stay Pending Appeal, including an attachment; (2) Return to Motion for Transfer of Case to South Carolina Supreme Court; and (3) a Certificate of Service.

Please file the originals and return a clocked-in copy of each document to me by way of my courier. I am appointed counsel for respondent Rocky A. Linkhorn, who is a criminal defendant. He was found indigent in the circuit court and is currently housed at GeoCare, a secure hospital. He has no assets or income. For this reason, I ask that filing fees be waived.

By copy of this letter, I am serving copies on all counsel of record.

Thanking you in advance for your assistance in this matter, I am,

Sincerely,



Elizabeth C. Fullwood

Enclosures

cc: William H. Davidson, II
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