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February 26, 2014

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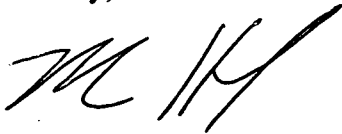
SC COURT OF APPEALS

Dear Sirs:

Please file my Initial Brief and certificate of service which is enclosed. Be advised that I received the Transcript from the motion hearing on January 29, 2014. Feel free to call me with any questions or concerns at: (704) 345-4573 or (704) 428-9009 x 704.

Thank you in advance.

Sincerely,



Marc Hubbard

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

Mark Hayes, Circuit Court Judge

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FEB 27 2014
SC Court of Appeals

Case No.: 2012-002751

The State of South Carolina,

Respondent,


v.

Marc Hubbard,

Appellant,

INITIAL BRIEF OF APPELLANT

Other counsel of record
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TABLE OF CONTENTS

TABLE OF CONTENTS

Index of Authorities i

Statement of Issues ii

Statement of the Case 1

Argument 2

 Did The Trial Court Err in Ruling That The State Had Extra-
 territorial Jurisdiction to Charge Appellant With Violation of the
 State of South Carolina Securities Laws, Where The Trial Court
 Ruled Using An Erroneous Standard of Review? 2

Conclusion 11

INDEX OF AUTHORITIES

INDEX OF AUTHORITIES

CASES

Capital City Insurance Company v BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009).

5

People v Blume, 505 N.W.2d 843, 846 (Mich. 1993)

7

State v Dudley, 354 S.C. 514, 581 S.E.2d 171 (S.C. App. 2003) 5, 6, 7

State v Miller, 289 S.C. 426, 346 S.E.2d 705 (1986)

4

State v Morris, 376 S.C. 189, 656 S.E.2d 359 (2008) 4

Tatnall v Gardner, 350 S.C. 135, 137 564 S.E.2d 377 (S.C. App. 2002)

4

Woodard v Westvaco Corp., 315 S.C. 329, 332, 433 S.E. 890 (Ct. App. 1993) *overruled on other grounds* 319 S.C. 240, 460 S.E.2d 392 (1995) 5

STATUTES

S.C. Code Ann. § 14-3-330 (1976) 4, 5

S.C. Code Ann. § 35-1-501 (2005) 1, 4, 5, 7, 8

S.C. Code Ann. § 35-1-508(a)(1) (2005) 1, 4

S.C. Code Ann. § 35-1-610(c) (2005) 6, 7,

8

STATEMENT OF THE ISSUES

STATEMENT OF THE ISSUES

- I. The Trial Court Erred in Ruling That The State Had Extra-territorial Jurisdiction to Charge Appellant With Violation of the State of South Carolina Securities Laws, Where The Trial Court Ruled Using An Erroneous Standard of Review.

STATEMENT OF THE CASE

STATEMENT OF THE CASE

Appellant was charged with Securities Fraud contrary to S.C. Code Ann. §§ 35-1-501 and 35-1-508(a)(1). The facts as lodged within the complaint vaguely detail any criminal conduct by Appellant, however, the indictment appears to involve a series of contract and promissory notes that Appellant executed on behalf of Sports Dimensions, Inc. (“SDI”). These agreements were signed with or in favor of RGV Builder, LLC (“RGV”) and PR Investments, entities controlled by Mr. Paul Ventresca, “on or between January 16, 2008 and September 11, 2008.” The indictment specifically alleged that Appellant “took over \$20,000 from Paul Ventresca for the alleged purpose of promoting an Alicia Keyes [sic] concert.”

Appellant moved for a dismissal of the charges, *inter alia*, that the court, and ultimately, the State lacked jurisdiction to prosecute any alleged criminal actions against Appellant. In Appellant's motion, Appellant argued there was a lack of subject matter jurisdiction, specifically extra-territorial, to try him on the charges of securities fraud. Appellant argued the State lacked extra-territorial jurisdiction due to the fact that the actions of Appellant - the signing of the promissory agreements - took place within the State of Florida, as opposed to South Carolina. The State argued that because Appellant's business address is in South Carolina, and the fact the check “passed through” South Carolina, jurisdiction was conferred upon the court to hear the case.

A hearing on Appellant's Motion to Dismiss was heard by the Court on December 6, 2013. During the hearing the trial court was “unsure” as to what the standard of review should be used to rule on the motion. As a result of the confusion of which standard of review to apply to the motion, the Court applied the standard of the “light most favorable to the non-moving party. (December 6, 2013 - Hearing Tr. pg. 19 n 1-4.) In applying this standard, the Court ultimately

denied the motion in an order dated December 11, 2013. Appellant files this timely appeal.

ARGUMENT

ARGUMENT

Did The Trial Court Err in Ruling That The State Had Extra-territorial Jurisdiction to Charge Appellant With Violation of the State of South Carolina Securities Laws, Where The Trial Court Ruled Using An Erroneous Standard of Review?

In this instant action, Appellant has been charged with violation of S.C. Code Ann. §§ 35-1-501 and 35-1-508(a) (2005), where it is alleged that Appellant entered into a series of promissory notes and agreements in connection with the promotion of a concert. The alleged agreements, which both parties, for the purpose of the hearing, stipulated were securities under South Carolina law, where entered into on or between January 16, 2008, by Appellant and a Mr. Paul Ventresca who controlled the entity PR Investments. (12/6/13-Hearing Transcripts pg. 18.) The State alleges that the Appellant “took over \$20,000” from Ventresca in connection with the promotion of a concert involving Alicia Keys concert.

Appellant first acknowledges the current state of the law, which states that there are no criminal appeals until *after* a sentence has been imposed upon the defendant. *State v Miller*, 289 S.C. 426, 346 S.E.2d 705 (1986)(We adhere to our view that under S.C. Code Ann. § 14-3-330 (1976) a criminal may not appeal until after sentence has been imposed.) However, S.C. Code Ann. § 14-3-330(1976) provides several exceptions to this rule. One exception being “(2) [a]n order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or *discontinues the action.*” See *Tatnall v Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377 (S.C. App. 2002). Had the trial court used the proper standard of review, as discussed *infra*, in reviewing Appellant's motion this would have discontinued the instant action, namely dismissing the charges against Appellant. Therefore, this appeals falls squarely within the requirements of S.C. Ann. § 14-3-

330 (1976).

Appellant motioned the trial court for dismissal arguing that the State lacked extra-territorial jurisdiction. See *State v Dudley*, 354 S.C. 514, 581 S.E.2d 171 (S.C. App. 2003)(extra territorial jurisdictions is a specific form of subject matter jurisdiction.) Appellant contends that at no time was there any indication that any action was transpiring within the State of South Carolina. (12/6/13-Hearing Transcript pg. 5.) The trial court, lacking guidance with regards to which standard of review was required, used the standard of “the light most favorable to the non-moving party” to deny the motion. (12/6/13-Hearing Transcript pgs. 13 and 34.) This standard was erroneous as the issue before the court was that of the court's jurisdiction to hear the case, which is a matter of law. *Capital City Insurance Company v BP Staff, Inc.*, 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009); *Lake v Reeder Constr. Co.*, 330 S.C. 242, 247, 498 S.E.2d 650, 653 (Ct. App. 1998). Accordingly, the court should have decided the question of its own jurisdiction on the facts before it. *Woodard v Westvaco Corp.*, 315 S.C. 329, 332, 433 S.E. 890 (Ct. App. 1993) *overruled on other grounds* 319 S.C. 240, 460 S.E.2d 392 (1995), not in the light most favorable to the nonmoving party.

In *Woodard*, just as the instant case, the trial court erred in concluding that it must view the evidence in the light most favorable to the party resisting the motion, and in using this standard deny the motion because the evidence, so viewed created a genuine issue of material fact. *Id.*, at 332. Had the trial court used the proper standard in reviewing the motion to dismiss, the court would have concluded the State lacked the proper jurisdiction to institute charges against Appellant in this action, as will be discussed below.

The State instituted charges against Appellant, alleging that he has committed securities fraud, contrary to S.C. Code Ann. § 35-1-501 (2005), for the notes that were prepared, agreed to,

and signed within the State of Florida. During the hearing, the State presented the position that because the money received from the transaction “passed through” South Carolina and Appellant maintained an address within the State, this provided the State with jurisdiction to bring charges against Appellant. Appellant's argument was the State lack jurisdiction as the actions which constitute the allegations happened within Florida, thereby, denying the State jurisdiction in this matter.

The parties, during the hearing, thoroughly discussed how the South Carolina courts have viewed the issue of jurisdiction as it applies to actions outside the State. Pursuant to S.C. Code Ann. § 35-1-610(c) (2005) jurisdiction is conferred on the State if the offer:

- (1) originates from within this State; or
- (2) is directed by the offeror to a place in this State and received at the place to which it is directed.

In the instant case, based upon the above reading of the code governing jurisdiction, the State lacks the necessary jurisdiction to institute charges against Appellant.

At the hearing the Appellant argued, which the promissory notes support, that the agreement and transaction occurred within the State of Florida. (12/6/13-Hearing Transcripts pg. 5.) Additionally, the Appellant argued that the funds were cashed in a North Carolina bank. (12/6/13-Hearing Transcript pg. 6.) At no time was there any actions within the borders of South Carolina. The State argued Appellant's actions fell under the ambit of the State's jurisdiction because Appellant's business was licensed within the State, Appellant held an address within the State, and money was ultimately transferred to the State. (12/6/13-Hearing Transcript pg. 12-13.) The State's argument is specious at best.

During the hearing on the motion, both parties relied extensively on *Dudley* to determine the issue of jurisdiction in this case. The Appellant's use of the rule of *Dudley* with regards to

jurisdiction is correct. Conversely, the State's argument with regards to the difference in facts of each case is also correct. By failing to adhere to the right standard of review, the trial court's ruling was not in line with the rule of law pronounced in *Dudley*, which is the State cannot bring charges against a defendant where the violation was not committed within the State. Although the facts of *Dudley* are distinguishable from the instant case, the rule of law is applicable. Where there is no action or intent to have a "detrimental effect within the state" the State does not have jurisdiction. *Id.*, at 533.

In *Dudley*, this court held the State lacked jurisdiction to charge defendant for delivery of drugs and conspiracy where the only nexus to the State was the drugs traveled through the State. In this case, the only nexus to the alleged crime is that Defendant had an address within the State, there were no actions that happened within the boundaries of the State, or keeping in line with *Dudley*, that there was proof of an "intent to have a detrimental effect within the state."

Lastly, in order to extend jurisdiction of the action pursuant to S.C. Code Ann. § 35-1-610(c) (2005) the State would have to prove there was an intent by Appellant to commit the crime. The transaction at issue here is nothing more than a contract violation between two parties as evidenced by a lawsuit filed by the offended party in Pennsylvania. However, the State has seen fit to "intervene" and, overreach its jurisdiction, by seeking to prosecute Appellant on securities fraud violation. Again, *Dudley* has pointed out that "[i]n order for South Carolina to exercise jurisdiction over the . . . offenses, the critical determination is whether [defendant] 'intended a detrimental effect to occur *in this state.*'" *Id.*, at 533 quoting *People v Blume*, 505 N.W.2d 843, 846 (Mich. 1993)(emphasis original). The charge of securities violation pursuant to S.C. Code § 35-1-501 (2005) is a specific intent crime. See *State v Morris*, 376 S.C. 189, 656 S.E.2d 359 (2008)(jury instructions charging in order to support a conviction, the jury needed to

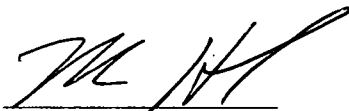
find the defendant intentionally misled investors, that defendant knew there was a danger that his conduct would mislead investors.) Although this element may be left to a trier of fact, this does not escape the fact the State lacks jurisdiction to charge Appellant. On the contrary, it supports Appellant's position that the State lacks jurisdiction to charge in the instant case. Without the element of intent, coupled with the lack of any actions being committed with the State, the State does not have jurisdiction to prosecute Appellant for securities violation.

CONCLUSION

The State lacks the necessary jurisdiction to charge Appellant pursuant to S.C. Code Ann. § 35-1-501 (2005), due to the lack of actions within the State and that there was no intent to defraud in accordance with S.C. Code Ann. § 35-1-610(c) (2005).

Dated: February 23, 2014

Respectfully submitted,



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APPEAL FROM SPARTANBURG COUNTY
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Mark Hayes, Circuit Court Judge

Appellate Case No.: 2013-002751

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The State of South Carolina,

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v.


Marc Hubbard,

Appellant,

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Heather S. Weiss by depositing a copy of it in the United States Mail, postage prepaid, on December 23, 2013, addressed at her offices of: Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, S.C. 29201

February 25, 2014



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