

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2013-CP-08-2002

The State,

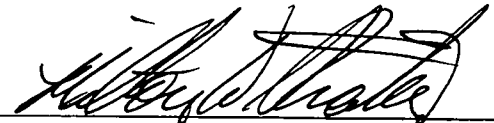
Respondent,

v.

Jami Morse,

Appellant.

AMENDED BRIEF OF APPELLANT



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SC Court of Appeals

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II. THE CIRCUIT COURT ERRED IN NOT DISMISSING THE APPEAL FROM THE LOWER COURT IN A CRIMINAL CASE THAT WAS FILED 23 DAYS AFTER THE WRITTEN JUDGMENT WAS SERVED ON ALL PARTIES.

III. THE CIRCUIT COURT ERRED IN CONDUCTING A DE NOVO REVIEW IN A CRIMINAL APPEAL FROM A MAGISTRATE’S COURT.

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ERR IN FINDING THAT THE RESPONDENT HAD PROPERLY PRESERVED LEGAL ERRORS FOR APPEAL?
- II. DID THE CIRCUIT COURT ERR IN FINDING THE STATE TIMELY FILED THE NOTICE OF INTENT TO APPEAL?
- III. DID THE CIRCUIT COURT HAVE AUTHORITY TO CONDUCT A DE NOVO REVIEW OF THE FACTS?

STATEMENT OF THE CASE

This is an appeal from a circuit court's reversal of the Magistrate's granting a directed verdict in a DUI case.

On May 7, 2013, Trooper C. K. Towns of the South Carolina Highway Patrol arrested the Appellant for Driving Under the Influence in violation of S. C. Code § 56-6-2930. The initial court appearance was scheduled in the Central Summary Court in Moncks Corner, SC for June 13, 2013, however, the Appellant filed notice requesting trial by jury, and the case was transferred to the Goose Creek Magistrate's Office for disposition. On June 18, 2013 the Magistrate held a pre-trial hearing that was attended by Trooper Towns, Attorney Stratos, and the victim, Kristopher Browder. Trooper Towns advised the court that the matter should be set for trial as he and Attorney Stratos were unable to negotiate a settlement. (R. p. 1).

On June 20, 2013 the Goose Creek Magistrate Court's clerk forwarded a summons notifying both the State and the Defendant that a jury trial was scheduled for 1:30 p.m. on August 6, 2013 in the matter of State v. Jami Morse. At no time prior to the call of the case for trial did Trooper C. K. Towns and/or any agent of the State Highway Patrol move to continue the matter and/or advise the court or counsel for Defendant of a reason for the State's failure to appear to prosecute the case. (R. pp. 1-2).

On August 6, 2013 the case was called to trial by the court's clerk. Trooper C. K. Towns did not appear and the Defendant made a motion for a directed verdict based on the State's failure to appear and submit evidence of the alleged offense. The Court granted Defendant's motion. A written order incorporating the court's decision granting a directed verdict was served, along with a complete copy of the magistrate court's file, on Trooper S.P. Grainger of the South Carolina Highway Patrol by hand delivery on August 13, 2013. (R. pp. 2-3).

On September 5, 2013, Assistant General Counsel for the South Carolina Department of Public Safety, filed an appeal in the Berkeley County Court of Common Pleas. The Appellant filed no post-trial motions prior to the filing of the appeal. The clerk of the Berkeley County Court of Common Pleas set the hearing date for the appeal on October 21, 2013. The Honorable R. Markley Dennis, Jr., heard arguments from counsel and ruled that Magistrate Edwards Session did not have the authority to call the case for trial and reversed the trial court order, granting the Appellant a new trial.

On October 22, 2013, Judge Dennis contacted both parties and requested a rehearing on the appeal. The hearing for the appeal reconvened on October 24, 2013, and the court entertained further argument of counsel. Although Judge Dennis reversed his previous ruling granting the State a new trial, Judge Dennis nonetheless found that the State was entitled to a new trial based on the Magistrate's failure to serve notice on the prosecuting officer, Trooper C.K. Townes, of the trial court's decision to proceed with a bench trial. This appeal follows.

ARGUMENTS

I. THE CIRCUIT COURT ERRED IN FINDING THAT THE RESPONDENT HAD PROPERLY PRESERVED THE LEGAL ERRORS FOR APPELLATE REVIEW

The circuit court erred as a matter of law in holding that the Respondent properly preserved issues for appeal when the Respondent failed to assert a contemporaneous objection at trial and/or file any post-trial motions, including but not limited to a motion for new trial.

Errors of law allegedly committed by the lower court that have been properly preserved shall be appealable to the circuit court in the county where the magistrate's authority exists. S.C. Code Ann. § 18-3-10 (Supp. 2005); State v. Bailey, 368 SC ___, 626 S.E.2d 898 (Ct. App. 2006). The circuit court's review of the magistrate's determination is limited to "the grounds of exceptions made" and those alleged errors otherwise preserved by competent exceptions. S.C. Code Ann. § 18-3-70 (Supp. 2005). It is axiomatic in this State that issues not raised at trial are waived on appeal. State v. Harris, 311 S.C. 162, 427 S.E.2d 909 (Ct. App. 1993).

In light of Respondent's failure to appear at trial after notice, the statutory prescription to insure the viability of Respondent's claims, if any, mandated that the Respondent file a motion for a new trial or judgment notwithstanding the verdict within five (5) days of receiving the judgment granting Appellant's motion for directed verdict. S.C. Rules of Magistrates Court, Rule 16(b); S.C. Code of Laws § 18-3-30, as Amended. Contesting the magistrate court's legal authority to grant a directed verdict was contingent upon the State entering an objection in order to preserve the right of appeal. The Respondent's failure to take any action until filing the appeal on September 5, 2013, precluded the circuit court from entertaining appellate review of the magistrate's ruling.

Appellant asserts that the Respondent is attempting to raise issues for the first time on appeal even though Respondent openly acknowledges the failure to raise any objection and/or obtain any

ruling from the magistrate's court. In similar cases our Supreme Court has consistently refused to consider even meritorious claims on appeal if the record is void of properly preserved issues for appellate review. State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005); id. 58-59, 609. S.E.2d at 523 ("If a party fails to properly object, the party is procedurally barred from raising the issue on appeal.") Moreover, issues unrelated to subject matter jurisdiction cannot be raised for the first time on appeal and only those issues raised and rule upon by the trial court are subject to appellate review. State v. Lippard, No. 2011-MO-003 (2011).

II. THE CIRCUIT COURT DID NOT HAVE THE JURISDICTION TO HEAR AN APPEAL FROM THE MAGISTRATE'S COURT THAT WAS FILED TWENTY-THREE DAYS AFTER RESPONDENT WAS SERVED WITH A WRITTEN COPY OF THE JUDGMENT IN A CRIMINAL CASE.

South Carolina Code of Laws section 18-3-30(A), as Amended, mandates that, "the appellant, within ten days after sentence, shall file notice of appeal with the clerk of circuit court and shall serve notice of appeal upon the magistrate who tried the case and upon the designated agent for the prosecuting agency or attorney who prosecuted the charge, stating the grounds upon which the appeal is founded." Timely filing the notice of appeal is crucial to the reviewability of preserved errors as a party's failure to timely serve notice divest the circuit court of subject matter jurisdiction. Precedent established in a number of South Carolina Supreme Court decisions mandates dismissal of the appeal when State failed to timely file the appeal. See First Carolina Nat'l Bank v. A & S Enters., Inc., 272 S.C. 339, 251 S.E.2d 762 (1979) (holding appellants' failure to serve their notice of appeal of the Circuit Court's judgment within the statutory period necessitated dismissal of their appeal for want of jurisdiction); Burnett v. South Carolina State Highway Dep't, 252 S.C. 568, 167 S.E.2d 571 (1969) (stating that without a timely notice of appeal, the reviewing court has no jurisdiction). The lack of subject matter jurisdiction can be raised at any time, can be [351 S.C. 526] raised for the first

time on appeal, and can be raised *sua sponte* by the court. Badeaux v. Davis, 337 S.C. 195, S.E.2d 835 (Ct. App.1999); Lake v. Reeder Const. Co., 330 S.C. 242, 498 S.E.2d 650 (Ct. App.1998); see also State v. Ervin,333 S.C. 351, 510 S.E.2d 220 (Ct. App. 1998) (holding issues related to subject matter jurisdiction may be raised at any time).

The Appellant's failure to perfect the appeal within the statutory time limit is fatal to their cause. The Respondent received verbal notice of the entry of judgment on August 7, 2013 and then received the written judgment on August 13, 2013. it is undisputed that the State was provided with "two audio recordings of the court proceedings, the Order granting Defendant Motion for Directed Verdict, a letter from Judge Sessions, a copy of all paperwork concerning defendant Jami Morse, and a copy of all emails pertaining to the Troopers' (Respondents) court dates" on August 13, 2013. (R. p. 3). The ten (10) day period in which the State could have perfected their appeal started no later than August 13, 2013, a date of service that is undisputed. The Appellant asserts that the State knowingly failed to file within the time prescribed by the General Assembly based on the Respondent's mistaken belief that the State had thirty (30) days in which to file and serve notice of intent to appeal; an assertion that remains unsupported by any known case, statute, or rule. The record is clear that the State neglected to file the notice of intent to appeal for twenty-two (22) days after receiving written notice of the directed verdict. Therefore, the Respondent failed to timely file the appeal and the circuit court could not otherwise obtain subject matter jurisdiction.

III. DID THE CIRCUIT COURT COMMIT REVERSIBLE ERROR IN CONDUCTING A DE NOVO REVIEW AND INCLUDING FACTUAL FINDINGS THAT WERE NOT PART OF THE MAGISTRATE'S RETURN?

In support of his decision to grant a new trial, the Honorable Markley Dennis made the following findings of fact that were not set forth in the record on appeal:

1. "In the interim, on June 21st the Highway Patrol placed Trooper Towns on indefinite leave."
2. "Although the case was scheduled for a jury trial, the magistrate called the case in the absence of a jury panel."
3. "Trooper Towns remained on leave and was not present."
4. "On August 12, 2013 Respondent's attorney faxed a proposed order to the court without sending a copy of the proposed order to the State."
5. "It appears, however, that on the day previously set for trial there was no jury venire present and thus no jury was selected and sworn."

The circuit court inexplicitly incorporated the above referenced facts to support the circuit court's determination that the magistrate committed "legal error" warranting a reversal. A reading of the magistrate's return confirms that these were not facts entered into the record on appeal either during the trial of this case or at any time thereafter, either by way of Motion or otherwise. A reading of the Magistrate's Return reveals that the circuit court adopted facts not part of the trial record. Not only do these facts not appear in the Magistrate's Return, the facts set forth are, in part, in contravention of the facts set forth in the Magistrate's Return. Notice of trial was forwarded to Trooper Town's on no less than two (2) occasions and, according the actual record, no request to continue Trooper Town's cases was sent to the magistrate's court prior to August 7, 2013, the day after the trial of this case. (R. pp. 1-2).

The findings of fact set forth in the order issued by the circuit court incorporated facts and circumstances not otherwise part of the magistrate's record and should not have been considered on appeal. Moreover, it is well settled that the circuit court has no authority to conduct a *de novo* review, but instead reviews for those errors of law properly preserved by appropriate exception.

State v. Henderson, 347 S.C. 455, 556 S.E.2d 691(Ct. App. 2001). The circuit courts' incorporation of facts and circumstances not set forth in the Magistrate's Return constitutes reversible error.

CONCLUSION

The uncontroverted fact as set out in the Magistrate's Return confirms that Respondent was properly served with notice of trial, however, Respondent did not appear to prosecute this case and/or file notice, pre-trial or post-trial, with the magistrate providing some reasonable basis for Respondent's absence at trial. Moreover, Respondent failed to engage in any act to preserve an issue prior to filing an appeal twenty-two (22) days after receiving the written judgment. Respondent's failure to preserve any issue and/or timely file the appeal mandates dismissal.

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AMENDED RECORD ON APPEAL



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AMENDED RECORD ON APPEAL

1. Magistrates Return including 9 attached exhibits.
 - i. June 4, 2013 Letter Requesting Jury Trial;
 - ii. Summons notifying parties of Pre-Trial dated June 13, 2013;
 - iii. Pre-Trial Order w/ Transmission reports dated June 20, 2013;
 - iv. Notice of Jury Trial dated June 21, 2013;
 - v. 2nd Notice of trial date to SCHP dated July 23, 2013;
 - vi. Verification SCHP received 2nd notice;
 - vii. List of dates of trial for each Trooper dated July 23, 2013;
 - viii. Verification of receipt of notice by SCHP dated July 23, 2013;
 - ix. 5 Pages of emails between court clerk and SCHP from June 1, 2013 thru June 13, 2013;
 - x. Trooper schedules sent to courts clerk from First Sergeant K. V. Welch verifying Trooper Towns work schedule from July 23, 2013 thru September 14, 2013;
 - xi. Notice to Berkeley County Magistrate dated August 7, 2013 of Trooper Towns leave of absence;
 - xii. Copy of Order dated August 12, 2013 granting Defendant's Motion;
 - xiii. Verification of service of all court documents, audio recordings and Order on SCHP dated August 13, 2013;
 - xiv. Magistrate Return Exhibit 13 setting forth SC Code sections concerning appeals from Magistrate's Court;
 - xv. Cover Letter w/ Notice of Intent to Appeal w/ file date of September 9, 2013;
2. Notice of Intent to Appeal;
3. Respondent's Reply;
4. Transcript from Circuit Court.
5. Email from Judge Dennis requesting 2nd hearing;
6. Proposed Order submitted by Appellant;
7. Statement from Respondent to circuit court objecting to inclusion of facts not of record;
8. Order signed by Judge Markley Dennis.