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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Pickens County
The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No: 2013-000656

THE STATE,

Respondent,

v.

CHRISTINA REECE,

Appellant.

RETURN TO MOTION TO VACATE CONVICTIONS, REMAND FOR A NEW TRIAL AND TO DISMISS THE APPEAL

Respondent, by and through undersigned counsel, and making Return to Appellant's Motion to Vacate Convictions, Remand for a New Trial and to Dismiss the Appeal would respectfully show unto this Court:

I.

Appellant was indicted at the June 2012 term of the Court of General Sessions for Pickens County for three counts of felony driving under the influence, great bodily injury (2012-GS-39-0948; -0949; & -0950). After a pretrial hearing held on January 28, 2013, the Honorable Letitia H. Verdin issued a **pretrial** order dated February 26, 2013, finding probable cause to obtain a blood sample from Appellant existed at the time the sample

was requested. (See Exhibits A and B attached to Appellant's Motion). On March 13, 2013, Appellant appealed from the pretrial order to the South Carolina Supreme Court. The Notice of Appeal was received by the South Carolina Supreme Court on March 18, 2013. (See Exhibit C attached to Appellant's Motion). The following day, the South Carolina Supreme Court issued an order dated March 19, 2013, dismissing the appeal without prejudice on the ground the appeal was premature and the pretrial order was not subject to immediate appeal. In effect, the South Carolina Supreme Court determined that Appellant pursued an improper, interlocutory appeal. (See Exhibit D attached to Appellant's Motion). Appellant proceeded to trial on March 19 – 20, 2013, was convicted of the three charges and was sentenced on March 20, 2013, to imprisonment for a period of ten (10) years. (See Exhibit E attached to Appellant's Motion). Appellant thereafter filed and served Notice of Appeal from the convictions and sentences on March 26, 2013. The South Carolina Supreme Court issued a remittitur respecting the premature appeal on April 4, 2013.

II.

Appellant moves this Court for an order declaring her convictions and sentences null and void and remanding the matter to the circuit court for a new trial. Appellant asserts that her improper, interlocutory appeal from the pretrial order finding probable cause existed to obtain a blood sample deprived the Pickens County Court of General Sessions of jurisdiction to proceed with trial and the that the convictions and sentences are null and void because they were obtained without jurisdiction of the circuit court. Specifically, Appellant contends that because the remittitur from the premature appeal of

the pretrial order was not issued until after the convictions were obtained and sentences pronounced, jurisdiction was not vested in the circuit court. Respondent submits that Appellant's argument is wholly without merit and the motion must be denied.

III.

In South Carolina, the right to appeal is conferred by S.C. Code Ann. § 14-3-330. State v. Miller, 289 S.C. 426, 426, 346 S.E.2d 705, 705 (1986). Generally, a judgment or order must be final or otherwise satisfy the terms of Section 14-3-330 before it can be appealed. State v. Wilson, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010); see State v. Miller, 289 S.C. at 426, 346 S.E.2d at 705 ("In order to exercise his statutory right to appeal, a defendant must come within the terms of the applicable statute."); see also Rule 201, SCACR (stating "[a]ppeal may be taken, as provided by law, from any final judgment, appealable order or decision."). It is axiomatic that in criminal cases, a criminal defendant may not appeal until the judgment becomes final which occurs when a sentence is imposed. State v. Robinson, 287 S.C. 173, 174, 337 S.E.2d 204, 204 (1985); see Berman v. United States, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment."). Thus, a criminal defendant may **not** appeal until **after** a sentence has been imposed. Parsons v. State, 289 S.C. 542, 542, 347 S.E.2d 504, 504 (1986). Moreover, the determination whether an appeal may be immediately taken from an order issued before or during trial is governed by S.C. Code Ann. Section 14-3-330. State v. Wilson, 387 S.C. at 597, 693 S.E.2d at 923, State v. Hill, 314 S.C. 330, 444 S.E.2d 255 (1994).

It is clear that the appellate court may determine the question of appealability as a matter of law. "Even if not raised by the parties, [the appellate court] may address the issue of appealability *ex mero motu*. 'The right to appeal is a jurisdictional matter and, even if the parties do not raise the issue of appealability, [the appellate court] must dismiss the appeal on [its] own motion.'" Levi v. Northern Anderson Co. EMS, and Berkshire Hathaway Homestate Ins. Co , Op No. 5243 (S.C.Ct.App. filed June 30 , 2014).

In this case, our Supreme Court has already determined that Appellant's appeal from the pretrial order was an improper, interlocutory appeal and was not a matter from which appeal could be immediately taken. Appellant did not dispute the correctness of the Supreme Court's conclusion that the appeal was an improper interlocutory appeal. The ruling is binding on this Court. Nevertheless, our decisions indicate that orders involving pretrial discovery and refusal to suppress evidence are not immediately appealable. Ferguson v. Charleston Lincoln/Mercury, Inc., 344 S C. 502, 544 S.E.2d 285 (Ct. App. 2001); Hamm v. South Carolina Pub Serv. Comm'n, 312 S.C. 238, 439 S.E.2d 852 (1994), Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986); Kemmerlin v. Bloom, 251 S.C. 49, 159 S.E 2d 910 (1968); State v Hubbard, 277 S.C. 568, 290 S.E.2d 817 (1982). Our Supreme Court has also specifically recognized that pretrial orders requiring an individual to provide blood or other samples are not immediately appealable absent an exceptional circumstance such as the presentation of a novel issue or a matter involving the rights of a minor. State v. Register, 308 S.C. 534, 536 FN1, 419 S.E.2d 771, 772 FN1 (1992).

As our Supreme Court properly concluded in this case, the pretrial order Appellant appealed presented no exceptional circumstance rendering it immediately appealable. Similar to a pretrial order committing a person to the custody of the South Carolina Department of Mental Health, the pretrial order in the appeal which was dismissed may be appealed after Appellant's conviction and sentence. See State v. Dingle, 279 S.C. 278, 306 S.E.2d 223 (1983) (stating that an order committing a defendant to the Department of Mental Health for a pretrial evaluation may not be appealed until the final judgment is rendered). Other jurisdictions have considered this issue and determined that orders such as is being presented to this Court are not appealable until the final judgment of sentencing. Robinson v Com., 440 Mass. 1034,800 N.E.2d 1044 (2004); Butler v. State, 311 Ark. 334, 842 S.W 2d 435 (1992); State v. Marut, 63 Ohio App. 487, 579 N.E.2d 281 (1989); In re Soloman, 465 F.3d 114 (3rd Cir 2006). Accordingly, the order of the South Carolina Supreme Court dismissing Appellant's appeal of the pretrial order as an improper interlocutory appeal was correct. See State v. Hubbard, 277 S.C. 568, 569, 290 S.E.2d 817, 817 (1982) ("No final judgment has occurred in this case and the order appealed from is interlocutory. Therefore, we dismiss the appeal and remand the case for trial." (citation omitted)).

Because Appellant could not yet pursue the appeal from the pretrial order, our Supreme Court never had proper appellate jurisdiction over Appellant's appeal. See Hagood v Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) ("An appeal ordinarily may be pursued only after a party has obtained a final judgment "), Tatnall v Gardner, 350 S.C. 135, 137-138, 564 S.E.2d 377, 378-379 (Ct. App. 2002) (instructing

that the appellate court did not have proper jurisdiction over an appeal that was interlocutory); see Miller, 289 S.C. at 426, 346 S.E.2d at 705 ("In order to exercise his statutory right to appeal, a defendant must come within the terms of the applicable statute."); see also North Carolina Fed. Sav. & Loan Ass'n v. Twin States Dev. Corp., 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986) ("The right of appeal arises from and is controlled by statutory law. The jurisdiction of appellate courts is prescribed by S.C. Code Ann § 14-3-330."). Because Appellant's appeal was an improper interlocutory appeal, jurisdiction never transferred from the circuit court to the Supreme Court but remained in the circuit court. See Tatnall, 350 S.C. at 137-138, 564 S.E.2d at 378-379 (recognizing that the appellate court did not have jurisdiction because the appeal was an improper interlocutory appeal).

When the order appealed is interlocutory and not immediately appealable, the service and filing of a notice of appeal does not transfer jurisdiction of the case to the appellate court and does not stay the proceedings in the trial court. South Carolina Pub. Serv Auth v. Arnold, 287 S.C. 584, 340 S E 2d 535 (1986); State v. Dingle, 279 S.C 278, 306 S E 2d 223 (1983); Muckenfuss v. Fishburne, 68 S C. 41, 46 S.E.2d 537 (1903). Because Appellant appealed a pretrial order that was not immediately appealable, the proceedings in the circuit court could proceed as scheduled despite the fact the remittitur had not been sent. The remittitur issued from the premature appeal merely forwarded the order dismissing the appeal as premature. It did not return jurisdiction to the circuit court because the circuit court never lost jurisdiction of the case. Because the circuit court had

jurisdiction over Appellant's case when it was called for trial, the convictions and sentences are valid and Appellant's motion must be denied.

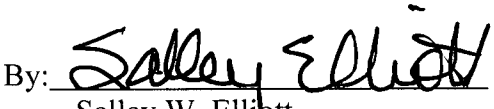
IV.

WHEREFORE, Respondent prays that this Court will deny Appellant's Motion and grant such other and further relief as the Court may deem just and proper

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

By: 
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July 11, 2014

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Motion to Vacate Convictions, Remand for a New Trial and to Dismiss the Appeal on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record Robert M. Dudek, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 14th day of July, 2014.

ANGELA BENNETT
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ALAN WILSON
ATTORNEY GENERAL

July 14, 2014

Robert M Dudek, Esquire
S C Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

Re The State v Christina Reece
Appellate Case No· 2013-000656

Dear Mr. Dudek

Enclosed please find two (2) copies of the Return to Motion to Vacate Convictions, Remand for a New Trial and to Dismiss the Appeal along with proof of service in the above-referenced case.

Sincerely,

Salley W Elliott
Senior Assistant Deputy Attorney General
S.C Bar No: 1871

SWE/ab
Enclosures
cc: The Honorable Jenny A. Kitchings
Ms. Trisha Allen - with enclosure