

STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS

JOHN C. HAYES, III, CIRCUIT COURT JUDGE

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OCT 02 2014

Appeal Case No. 2013-002580

SC Court of Appeals

Christopher A. Wellborn.....Appellant,

v.

The City of Rock Hill.....Respondent.

RESPONDENT'S FINAL BRIEF

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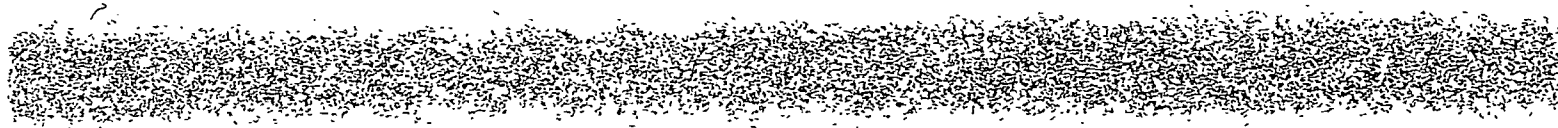


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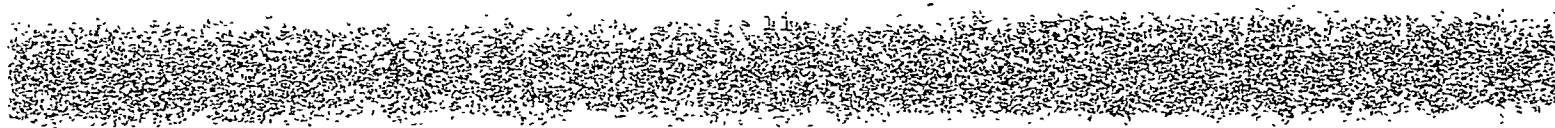
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STATEMENT OF THE ISSUES ON APPEAL

- I. The Circuit Court did not err in affirming the lower court's finding of contempt.
- II. The Circuit Court did not err in affirming the lower court's discretionary decision to preside over the contempt matter occurring in his court, rather than recusing himself.
- III. The Circuit Court did not err in affirming the lower court's finding of contempt under Sections 22-3-950 and 40-5-510.

STATEMENT OF THE CASE

Appellant Christopher Wellborn represented David Cullen in Rock Hill Municipal Court. Anna Timothy-Miller represented the City of Rock Hill at trial. The Honorable Peter Lenzi presided over the trial on January 16, 2013. During the proceedings, Appellant was held in contempt on several grounds (to be discussed at "Statement of Facts"), which would later be reduced to writing by the trial judge and would form the basis of the contempt hearing requested by the Appellant. Mr. Wellborn requested and was granted a continuance until March 25, 2013 to obtain counsel to represent him at his hearing. James Boyd appeared on behalf of Appellant and filed a Motion for Recusal, which was received by the trial court on Friday, March 22, 2013. The motion was addressed by the court at the contempt hearing on Monday, March 25, 2013. That motion was denied. The hearing convened. Judge Lenzi considered and dismissed one allegation of contempt and found Appellant in contempt on the remaining two of three.

Judge Lenzi's Order of Contempt was issued on March 28, 2013. The Appellant's Notice of Appeal to the Circuit Court was mailed on April 10, 2013. The Return to Appeal was filed on May 1, 2013. The appeal was heard by Circuit Court Judge John C. Hayes, III, on August 27, 2013. James Boyd, Esquire, appeared for Appellant. Respondent was represented on appeal by City Solicitor Paula Knox Brown.

Judge Hayes's Order affirming the trial court was filed on October 2, 2013. Appellant's Motion to Reconsider was forwarded to the Court of Appeals on October 9, 2013. City's Response to Motion to Reconsider was filed in the Circuit Court on October 25, 2013. Judge Hayes's Order denying the Motion to Reconsider was filed on November 13, 2013. Notice of Appeal to the Court of Appeals was sent to Senior Solicitor Christopher Barton and City Solicitor Paula Knox Brown on November 20, 2013. Appellant's Initial Brief was served on Respondent on January 27, 2014.

The standard of review is whether any evidence supports the court's decision or whether there is an abuse of discretion, amounting to an error of law. Floyd v. Floyd, 356 S.C. 56, 71-72, 615 S.E.2d 465 (S.C. App, 2005) The court, sitting in its appellate capacity, cannot make its decision de novo. Where the

law supports the court's decision and there has been no abuse of discretion, the decision will be upheld.

FACTS

Christopher Wellborn represented David Cullen in Rock Hill Municipal Court. Mr. Cullen's case was docketed for trial on January 16, 2013, at 9:00am and was called for trial on that day. (Verified Petition Alleging Contempt of Court, p.1, ¶2, L5, at Exhibit 1 to Return to Appeal; Return to Appeal, p.1, ¶1, L2). On the preceding Wednesday, January 9, 2013, Judge Lenzi conducted his docket call, which included a phone conference with Mr. Wellborn regarding the Cullen case. Over the phone's loudspeaker, "Mr. Wellborn spoke to the Judge, the Clerk, Solicitors Paula Brown, Anna Miller, and Kindle Johnson and informed the Court that the Cullen case was a definite trial. The Solicitor, Anna Miller, concurred." (Verified Petition Alleging Contempt of Court, p.1, ¶3, Ls 1-3, at Exhibit 1 to Return to Appeal].

On the morning of trial, neither Appellant nor his client were present for court. (Verified Petition Alleging Contempt of Court, p.1, ¶4 at #1.) The Court instructed Ms. Miller to contact Mr. Wellborn to find out why he was not in Court. (Id., p.1) Ms. Miller did as instructed. In the course of talking with Mr. Wellborn by phone, she learned that he was in Charlotte having his car serviced. Mr. Wellborn was advised that the court

intended to strike his jury and proceed with the trial.

(Affidavit of Anna Miller, p.1)

Once Appellant arrived and the trial began, Judge Lenzi addressed Mr. Wellborn's request to inform the jury why he and his client were late to court. Judge Lenzi specifically instructed Appellant not to address those matters in any way in the jury's presence. After a warning from the court when he apologized to the jury for being late, Mr. Wellborn completed his opening. He then asked permission to check in the hallway for his client, who had not yet arrived. On his way out of the courtroom and while passing the jury to exit the courtroom, Mr. Wellborn remarked that he wanted to explain to the jury why he and his client were late in arriving. Judge Lenzi saw the remark as direct disobedience to his oral order and found that and other behaviors and comments during the trial contemptuous.

The contempt hearing was continued to allow Mr. Wellborn time to engage counsel and for counsel to prepare. The hearing was held on March 25, 2013. Judge Lenzi held appellant in contempt on several, but not all, of the grounds for contempt in his bill of particulars. An appeal to the Circuit Court followed. Having the Court of Common Pleas grant one ground for appeal and affirm the trial court on the other, prompted this appeal to the Circuit Court.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE LOWER COURT'S FINDING OF CONTEMPT

Mr. Wellborn sought a reversal of the trial court's findings on several grounds. First, The Honorable Peter Lenzi erred in failing to recuse himself. Second, the contemptuous conduct is not clearly and specifically reflected in the record. Third, the court erred in finding Mr. Wellborn in contempt of court "concerning his violation of the court's order not to make any comment concerning his or his client's tardiness in appearing for trial on January 16, 2013 in the presence of the jury. The alleged error being that the conduct neither assaulted the magistrate nor constituted undue disturbance to the proceedings under §22-3-950. Fourth, the court erred in finding that the statement allegedly made in the hallway by Mr. Wellborn was contemptuous.

That statement was "[G]iven the way the Rock Hill Municipal Court is run, I am never quite sure when I am suppose[d] to be here." Mr. Wellborn denied making the statement as alleged and maintained that the statement he did make was uttered in a hallway and was not only made outside the presence of the court but also constituted no undue disturbance of the proceedings

while the Judge was sitting officially. That the contempt occurs in the presence of the court and/or causes an undue disturbance in the proceedings are requirements under §22-3-950. Additionally, there was the question whether the statement was tantamount to disorderly conduct causing an interruption of business or amounting to an open or direct contempt of the court, as required by South Carolina Code §40-5-510.

(Respondent's Circuit Court Brief, p.)

The Circuit Court reversed the trial court as to the fourth ground. Judge Hayes found that the comment made in the hallway was not contemptuous, given the specific requirements of §40-5-510 and §22-3-950, it did not view the first three grounds in a similar light. (Circuit Court Order, p.4, L1 - p.5, L10). The Court of Common Pleas found Appellant's direct disobedience to the court's instruction not to say anything about his or his client's tardiness in front of the jury was "open and direct contempt to the court." (Circuit Court Order, p.5, L11 - p.6).

As to the remaining grounds for appeal, the Circuit Court reviewed the record regarding evidentiary support for the trial court's decision and/or abuse of the court's discretion. Finding both evidentiary support for the trial court's decision and no abuse of discretion, the Circuit Court affirmed the trial court. That decision was without legal error, was based on evidentiary

support, and was not an abuse of discretion. The Circuit Court's decision was proper and should be affirmed.

II. The Circuit Court did not err in affirming the trial court judge's discretionary decision to preside over the contempt matter occurring in his court, rather than recusing himself

In the Circuit Court, Appellant appealed his contempt order because the trial judge erred in failing to recuse himself. A Motion for Recusal was filed with the Rock Hill Municipal Court prior to the March 25, 2013 hearing in the Christopher Wellborn matter. The ground for the motion was that Canon 3E(1)(d)(iv), Canons of Judicial Conduct, requires a Judge who is "likely to be a material witness in the proceeding" to recuse himself. Per the discussion on the record at the contempt hearing, Judge Lenzi considered this canon in light of State v. Kennerly, 337 S.C. 617, 524 S.E.2d 837 (S.C. 1999) and US v. Peoples, 698 F.3d 185. Judge Lenzi did not agree that his recusal was mandated by the canon any more than Judge Conrad in the Peoples case would have been required to do. In Peoples Judge Currie tried the defendant on several charges and warned him on several occasions about being late for her court. She eventually told Peoples that he would need to show cause why he should not be held in contempt. Mr. Peoples, outside Judge Currie's physical presence uttered some comments, which were heard by a clerk and recorded by a court reporter and which led to additional contempt

charges. Judge Currie decided to recuse herself and a judge from another court, Judge Conrad, handled the Rule to Show Cause hearing. Mr. Peoples arrived late for Judge Conrad's court and found himself facing yet another contempt charge. Unlike Judge Currie, Judge Conrad did not recuse himself from the proceedings. Although he was reversed on the contempt proceeding in the case that he initiated, it is critical to note for purposes of this analysis that the court's reasoning had nothing to do with Judge Conrad's failure to recuse himself from the proceedings, nor did the Court say that Judge Currie would have been remiss had she decided to preside over the hearing herself. Essentially, to say that Canon 3E(1) (d)(iv) dictates that a trial judge who finds a person in contempt in his court must recuse himself in that person's contempt hearing is tantamount to saying that a trial judge can never preside over a contempt hearing that he or she initiates in his or her court. The Judicial Canons did not require that result in Peoples; and, they do not require that result here. (Record, p. 39, L5-36).

Appellant's appeal was denied on this ground. In affirming the trial court's finding, Judge Hayes noted the following..

The Trial Judge denied the Appellant's motion for recusal without elaboration. Implicit in his ruling is the judge's determination that he was not likely to be a material witness.

As set forth below, a Trial Judge has the inherent power to hold one in contempt. This power resides with the Trial Judge, that is, the judge in whose presence a contemptuous act occurred or whose direct order has been disobeyed. Here, the Trial Judge, Judge Lenzi, was not obliged to recuse himself. (Record, p. 9, L3-8)

Additionally,

Neither a summary court judge nor any other members of the unified judicial system are to be prohibited from punishing conduct as contemptuous when it violates a direct order of the Court. A court without the authority to effectuate its orders by way of a finding of contempt is a neutered court. Requiring recusal in these instances would, as stated, neuter a court's ability to conduct the business of his/her courtroom. (Record, p.12, L18-L22)

In noting the standard of review, Judge Hayes quoted Floyd v. Floyd, 365 S.C. 56, 615 S.E. 2d 465 (Ct. App. 2005): "a decision on contempt rests with the Trial Judge and is not subject to reversal unless the decision lacks evidentiary support or the Trial Judge abused his or her discretion." (Record, p.9, L10-L12).

The Circuit Court did not err in affirming the trial court. There was neither an abuse of discretion nor an error of law. Based on that standard, this appeal of the Circuit Court's Order and Reconsideration Order should be denied on this ground.

III. The Circuit Court did not err in affirming the lower court's finding of contempt, despite Sections 22-3-950 and 40-5-510.

Mr. Wellborn appeals the Circuit Court's affirmation of the trial court under §§40-5-510 and 22-3-950. He reasons that, when he addressed the issue of his and his client's tardiness in

front of the jury, despite the court's admonition and warning to refrain from doing so, that address did not amount to an assault to the magistrate or constitute an undue disturbance to the proceedings under §22-3-950. That section states the following:

Every magistrate shall have power to enforce the observance of decorum in his court while holding the same and for that purpose he may punish for contempt any person who, in the presence of the court, shall offer an insult to the magistrate or a juror or who is wilfully guilty of an undue disturbance of the proceedings before the magistrate while sitting officially. A magistrate shall have the power to punish for contempt of court by imposition of sentences up to the limits imposed on magistrates' courts in *Section 22-3-550*. §22-3-950, South Carolina Code of Laws, 1976, as amended.

However, for purposes of examining this behavior, not only is §22-3-550 relevant, but so is §40-5-510, which reads as follows:

Attorneys, solicitors and counselors may be removed or suspended and also, in aggravated cases, imprisoned, not exceeding twenty-four hours, by the several courts in which they have been admitted to practice, if, in the presence of such court, they are guilty of any disorderly conduct causing an interruption of business or amounting to an open and direct contempt to the court, its authority or person.

This language is consistent with that in Kennerly and Peoples. Additionally, State v. King, 306 S.C. 335, 412 S.E.2d 375 (SC 1991) indicates that "[c]onduct which tends to bring authority and the administration of the law into disrespect constitutes contemptuous behavior." *Id.*, 338. Judge Lenzi expressed it on the record at the contempt hearing as follows:

You know, my experience is criminal defense lawyers are always playing it close to the edge. They're going to push the envelope every time. But what I told him was not to make any comment in the jury's presence concerning that issue. I have to think that there was at least a potential tactical advantage to asking for permission

to explain that, with some jurors being perhaps interested in such an answer and the big, mean judge saying, no, you can't do that. Mr. Wellborn doesn't follow my very specific simple, direct order. And I'm going to find that conduct is contemptuous. (Record, p.111, L2-13)

Without question, attorneys are to vigorously defend and advocate for their clients, as in State v. Harper, 297 S.C. 257, 376 S.E.2d 272 (SC 1989) where the attorney's contempt conviction was reversed by the South Carolina Supreme Court for standing to ask the court's permission to address the court as the court had ordered him to do before raising any objections or concerns to the seating of the jury. However, the behavior in this case was, in Judge Lenzi's observation, totally different. Judge Lenzi specifically told Mr. Wellborn to make no comments about his and his client's tardiness to the jury. (Record, p.110, L7-16) Mr. Wellborn completed his opening statement with only one additional warning from the court after he (Mr. Wellborn) apologized to the jury for being late. (Record, p.96, L24-25; p. 97, L1-15) He then requested and received permission from the court to go to the adjoining hallway to check for his client. On the way out of the room and while passing the jury on the way, Mr. Wellborn remarked that he wanted to explain to the jury why he and his client had been late in arriving. (Record, p.110, L17-25; p.111, L1; p. 15, L10-19) "Courts repeatedly have found that offensive words directed at the court may form the basis for a contempt charge." US v. Peoples, 698

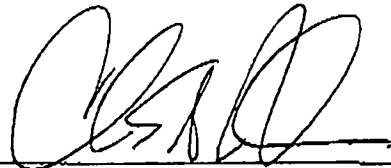
F.3d 185 (4th Circ, 2012) Although the contemptuous statements in *Peoples* were not directly heard by Judge Currie, being uttered while she was outside the courtroom, the Court found that "Peoples' outburst was both threatening and directed at the court, and thereby constituted misbehavior..." Peoples, pg 8. Because Peoples' outburst "caused Judge Currie and court personnel to spend time participating in the subsequent investigation of the outburst..." and "required court personnel to cease their regular duties and tend to the outburst," it was deemed to obstruct the administration of justice or to be disorderly. Peoples, . It was not great, but it need not be. Peoples, pg 9. Here, Court personnel, including Judge Lenzi have expended quite a bit of time and effort in addressing Mr. Wellborn's behavior, thereby obstructing the orderly administration of justice, as described in *Peoples*. Further, Judge Lenzi found Mr. Wellborn in contempt for "conduct which tends to bring authority and the administration of the law into disrespect", such conduct constituting contemptuous behavior. He did so because of Mr. Wellborn's decision to make comments that cast the court in a suspect light in front of the jury and, in doing so, failing to follow Judge Lenzi's "very specific simple, direct order." (Record, p.42, L1-25)

Mr. Wellborn's appeal was denied on this ground. In affirming the trial court, Judge Hayes did not abuse his

discretion; and, his decision was not without evidentiary support. The Circuit Court's Order should, therefore, be affirmed.

CONCLUSION

The Circuit Court did not err in affirming the lower court's finding of contempt. The Circuit Court did not err in affirming the trial court judge's discretionary decision to preside over the contempt matter occurring in his court, rather than recusing himself. The Circuit Court did not err in affirming the trial court judge's finding of contempt under Sections 22-3-950 and 40-5-510. The Circuit Court's decision was without legal error, was without abuse of discretion, and was supported by the evidence in the record. The Circuit Court's decision should, therefore, be affirmed.



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Attorneys for Respondent

IN THE STATE OF SOUTH CAROLINA
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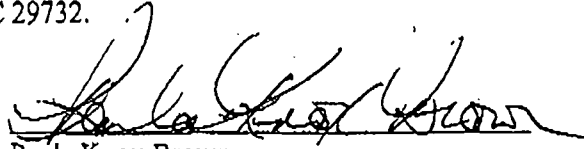
v.

City of Rock Hill.....Respondent.

CERTIFICATE OF SERVICE

I, Paula Knox Brown, hereby certify that I served the *Respondent's Final Brief on Counsel* for Appellant, James Boyd, Esquire, by depositing a copy of the document in the United States mail, with sufficient postage affixed, on the 2nd day of October, 2014. The envelope was addressed as follows:

James W. Boyd, Esquire
Post Office Box 36425
1544 Ebenezer Road
Rock Hill, SC 29732.



Paula Knox Brown
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October 2, 2014
Rock Hill, SC



October 2, 2014

The Honorable Jenny Abbott Kitchings
 Clerk of the South Carolina Court of Appeals.
 Post Office Box 11629
 Columbia, SC 29211

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SC Court of Appeals

RE: Christopher Wellborn
 v.
 City of Rock Hill
 Case No. 2013-002580

Dear Ms. Kitchings:

Enclosed is the unbound original with fifteen (15) copies of the Respondent's Final Brief with the original Certificate of Service and one (1) copy. By copies of this letter, I am both faxing a copy of the Brief and Certificate of Service to you and forwarding a copy of each to James Boyd, Attorney for Appellant.

Sincerely,

Paula Knox Brown
 City Solicitor

cc: Christopher Barton, Senior Solicitor (via hand-delivery)
 James Boyd, Esquire





FAX COVER SHEET

TO: The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
@ 803-734-1839

cc James Boyd, Esquire
@ 328-5747

FROM: Paula Knox Brown
City Solicitor

DATE: October 2, 2014

RE: Christopher Wellborn v. City of Rock Hill

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SC Court of Appeals

Please see the attached letter and documents, which are being served on Appellant and forwarded for filing to this Court by mail.

