

APPEAL FROM GREENVILLE COUNTY
COMMON PLEAS COURT
Letitia H. Verdin, Circuit Court Judge

RECEIVED

MAR 18 2015

SC Court of Appeals

Case No.: 2011-CP-23-03563
Appellate Case No.: 2012-208627

State of South Carolina, Respondent,

v.

Andrew T. Looper, Appellant.

PETITION FOR REHEARING, *and*

SUGGESTION FOR REHEARING *EN BANC* (Rule 219(b) SCACR)

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PETITION

Petitioner respectfully submits that the Court's decision in this case overlooked or misapprehended points that are essential to the determination of the issues. Accordingly, Petitioner moves for a rehearing based on the following arguments.

SUGGESTION FOR REHEARING EN BANC

Petitioner further submits that the panel's dismissal of the appeal will effectively bind the trial magistrate and prevent independent fact finding and determinations by the magistrate in any further trial proceedings. It will further reverse the application of the standard of review and deference due the trial magistrate in any appeal from further trial proceedings. The panel's decision will irreparably injure the Petitioner's position in any subsequent appeal. Therefore, based on the arguments as more fully set forth below, the Petitioner suggests that he be granted a rehearing *en banc* pursuant to Rule 219(b) SCACR.

I. APPELLATE JURISDICTION IS PROPER IN THIS CASE.

The Court's decision rests on the definition of "aggrieved" as defined in Cisson v. McWhorter, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970). Cisson involved the question of whether or not a mortgagor had standing to appeal the sale of property due to foreclosure on a mechanic's lien. In Cisson the mechanic's lien and foreclosure were all subject to the appellant's mortgage. As the mortgage primed the mechanic's lien, the record failed to show any potential harm to the mortgagor by the foreclosure. On this basis, the Court in Cisson found that the mortgagor could suffer no harm from the legal action, and therefore was not in any way "aggrieved" by the lower court's decision. There the Court held: "There can be no benefit or improvement in the appellant's position should we reverse the judgment of the lower court." Cisson v. McWhorter, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970). On that basis the court held that Cisson was not an aggrieved party. Here, although this is not a civil standing question, even under Cisson's analysis there is clearly a benefit or improvement of the Petitioner's position if the erroneous decision of the circuit court were to be reversed. Reversal of the circuit court would end the case and the Petitioner suffer no further prosecution. Also, as discussed more fully below, dismissal of this appeal will result in a detrimental change in Looper's position and rights in any subsequent

challenge to the admission of the same evidence. Cisson's rationale therefore requires that Looper be allowed this appeal on the merits. Because the appellate process would effect the rights and legal position of the Petitioner, Cisson does not act as a bar to Looper's appeal.

This Court's application of Cisson in this case is further flawed in the failure to recognize that Cisson's definition of "aggrieved" is derived from a case involving a completely different application of the term. Cisson derives its definition of *aggrieved* from Parker v. Brown, 195 S.C. 35, 52, 10 S.E.2d 625, 632 (1940). Parker, which was a civil case, involved the question of whether the county tax collector had standing to sue the county treasurer for failing to collect certain taxes from which the tax collector would have otherwise have been able to collect a fee. The question as to whether the tax collector was an "aggrieved" party was a question of standing to sue, not whether he had the statutory right to appeal. The Court in Parker interpreted the term "aggrieved" as it applied to Section 3054 of the 1932 Code of laws, which provided:

Section 3054 of our 1932 Code provides that bonds of public officers may be sued on, reads as follows: "The bond of any public officer in this State may at all times be sued on by the public, any corporation, or private person, *aggrieved* by any misconduct of any such public officer; for which purpose the officer or officers, for the time being, with whom such bond may be filed, or recorded upon application

at his or their office, shall deliver to any person applying therefor and paying the fees for doing the same an exact and certified copy of the bond of such public officer there deposited, or recorded; which copy so certified shall be good and sufficient evidence in all suits to be instituted in any Court of this State."

Parker v. Brown, 195 S.C. 35, 44, 10 S.E.2d 625 (1940) *Emphasis added*.

Parker's inapplicability to the present issue is further evident in its reliance on another civil case Bowles v. Dannin, 62 R.I. 36, 2 A.2d 892 (1938). Bowles interpreted a Rhode Island statute finding that a probate judge who had no personal or official interest in appealing a case in which he presided. The Bowles Court held that having no personal interest in the case, the judge was not "aggrieved" so as to justify an appeal of what would be essentially of his own decision. Bowles rationale would not apply here to a criminal case where the defendant is the appellant. Clearly the defendant in a criminal case has a personal interest in the case, and therefore the appeal.

Parker, and this Court's opinion, each cite Bivens v. Knight, 254 S.C. 10, 173 S.E.2d 150 (1970). Bivens is equally unsupportive of this Court's decision. In Bivens the Court addressed the same issue as the Rhode Island Court in Bowles. Bivens appealed from a decision that did not in any way affect him. The decision affected only Bivens's wife, but did not have any impact on Bivens whatsoever. It

was on this basis that the Court held that Bivens could not appeal the civil judgement stating: "A party, therefore, cannot appeal from a decision *which does not affect his interest*, however erroneous and prejudicial it may be to the rights and interests of some other person." Bivens v. Knight, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970) *Emphasis added*. Here, Looper clearly has an interest in the case and is effected by the decision of the lower court, as well any subsequent appeal.

In Looper's case the magistrate conducted an evidentiary hearing. As a result of that hearing the magistrate suppressed evidence obtained as a result of a traffic stop. Based on the lack of other competent evidence to support the case going to the jury, the magistrate subsequently dismissed the charge against Looper. The magistrate issued a written order detailing his findings of fact, analysis of the law, and dismissal of the charge. It is from that order that the State appealed to the circuit court. (R. p. 6).

Although a defendant may generally not immediately appeal from an adverse evidentiary ruling at trial, the decision of the magistrate to suppress evidence and consequently to dismiss a charge, are both issues that are appealable by the State to the circuit court. *See State v. McKnight*, 287 S.C. 167, 337 S.E.2d 208 (1985), (concluding a pretrial order granting the suppression of evidence that significantly impaired the prosecution of the State's case could be directly

appealed by the State under section 14-3-330(2)(a)). In *Looper's* case the *State* appealed from the evidentiary ruling and order of dismissal by the trial magistrate. The State was therefore the appellant in the circuit court appeal. Procedurally, this fact is important since the State's appeal properly vested appellate jurisdiction in the circuit court. Once jurisdiction for the appeal was been established in the circuit court, the general rule as stated in *Miller* no longer applies, and the right for either party to appeal further is controlled by statute. *See Gregorie, State v. Gregorie*, 339 S.E.2d 77 (2000). Under *Gregorie*, once the circuit court makes its final ruling on the issues under appeal, further appeal to this Court is specifically governed by Sections 18-1-30 and 18-9-10.

In *Gregorie*, the defendant appealed his magistrate convictions to the circuit court. The circuit court reversed and remanded the charges to the magistrate's court. The defendant appealed the decision of the circuit court to this Court, and subsequently to the Supreme Court. In *Gregorie* the Supreme Court specifically clarified the appealability issue when appeal is taken from the circuit court.

The Court in *Gregorie* held that *Gregorie's* right to appeal from an order reversing and remanding by the circuit court was a statutory right: "Any aggrieved party may appeal the circuit court's final judgment." *Gregory*, 399 S.C. 2, at 4, *citing* S.C. Code Ann. Sections 18-1-30 and 18-9-10. In appeals involving the

circuit court's ruling on a magistrate court appeal, the operative question is simply whether the party bringing the appeal is *aggrieved* by the circuit's court's appellate ruling. Even applying the rationale underlying the cases cited by this Court, to be aggrieved, Looper simply must have a personal interest in the outcome of the case that could be effected by the appeal. Because his case involved an evidentiary ruling and dismissal, as more fully discussed below, he is effected by the circuit court's reversal of the magistrate. He is likewise effected by any subsequent decision on appeal for the same reason. Even though double jeopardy did not attach in Looper's case as it had in Gregorie, Looper nonetheless is detrimentally effected by the circuit court's appellate reversal of the trial court's ruling, as well as this Court's dismissal of his appeal. Looper is therefore an "aggrieved party" for the purposes of Sections 18-1-30 and 18-9-10.

The initial disposition of the charges by the magistrate court in Looper's favor is essential to the question of appealability of Looper's case under the rationale in Gregorie. In Gregorie the appellant had been convicted, and therefore, could rightfully appeal to the circuit court. Upon appeal by Gregorie, jurisdiction vested with the circuit court. There, where the appeal was then properly before the circuit court sitting in an appellate capacity. The resulting order by the circuit court reversing and remanding the charges to the magistrate was held to be

immediately appealable to the appellate court.

In Looper's case the charge was dismissed by the magistrate, and it was the State that appealed to the circuit court. In both cases, appellate jurisdiction was properly vested in the circuit court by the initial appeal from the magistrate's court. *See (State v. Wees, 138 Idaho 119, 58 P.3d 103 (Ct.App.2002) Appeal heard by the court of appeals from the district court's reversal of a magistrate court order dismissing the criminal complaint.); (State v. George, 127 Idaho 693, 905 P.2d 626 (1995) Appeal heard by Supreme Court of Idaho from the district court's reversal of a magistrate's dismissal of traffic infraction citations.)* Applying the rationale of Gregorie, once an appeal is properly before the circuit court, the circuit court's appellate decision becomes appealable by *any aggrieved party*. The adverse ruling by the circuit court as a court of appeals is a sufficient basis for the appeal where the reversal will place a greater burden on Looper in any subsequent appeal.¹ More so where the circuit court has failed to apply the proper appellate standard of review or make specific findings to support its decision. In this case, as in Gregorie, the appeal was properly before the circuit court, and as a result, the circuit court's decision reversing and remanding Looper's charge constitutes an

¹The argument on the detrimental impact is more fully set forth below and is incorporated herein.

appealable order under Sections 18-1-30 and 18-9-10.

II. THIS COURT ERRED IN FAILING TO ADDRESS THE APPEAL ON THE MERITS.

This Court's decision to dismiss the case rather than address the merits deprives Looper of due process leaving no recourse where the circuit court, sitting as an appellate court that has failed to apply the proper standard of review or make any findings of fact or otherwise state a sufficient basis for its appellate decision. This is also inconsistent with prior cases reversing the circuit court where it engaged in fact finding sitting in an appellate capacity: "The circuit court, sitting in its appellate capacity, may not engage in fact finding." City of Greer v. Humble, 402 S.C. 609, 618, 742 S.E.2d 15, 20 (Ct.App.2013) (quoting Rogers v. State, 358 S.C. 266, 270, 594 S.E.2d 278, 280 (Ct.App.2004)). Here, the circuit court has acted outside of its appellate jurisdiction. This Court's decision provides no recourse for Looper and leaves the circuit court's actions without recourse or meaningful review by any court.

The dismissal of this appeal means that the circuit court's appellate decision will never be effectively subject to review. Additionally, any later appeal will leave Looper in a more burdensome position due to the standard of review and practical effect of this Court's dismissal. This Court has analogized the circuit court's appellate decision to an interlocutory order as in State v. Hubbard, 277

S.C. 568, 290 S.E.2d 817 (1982). This analogy is inaccurate. In Hubbard the appeal was from the *denial* of a motion to suppress. Hubbard held that no final judgment had occurred in the case and therefore, was not appealable. State v. Hubbard, 277 S.C. 568, 290 S.E.2d 817 (1982). But this was based on the underlying premise that the denial of the motion could be preserved for later appeal subsequent to Hubbard's trial. Looper appeals not from the denial of an evidentiary motion, but from the appellate order of the circuit court reversing the suppression of evidence and dismissal of the charge. A final judgment had occurred by way of the dismissal of the charges. Similarly, in Isaac the appeal was from the *denial* of the trial court to grant relief to the defendant. As the supreme court indicated in Isaac, the *denial* of a motion to suppress evidence is not immediately appealable. That rationale however, does not apply here where the granting of the motion and subsequent dismissal was by statute immediately appealable by State. Jurisdiction and standing for the appeal process to begin was properly engaged by the State's appeal from the magistrate. There is no authority for the proposition that the appellate process, properly initiated, could then suddenly terminate without further review.

The question presented here is whether Looper should have recourse to challenge what he contends is an erroneous ruling of an appellate decision by the

circuit court. Under this Court's opinion a lower appellate court may act unchecked by further appellate review. This is not the intent or holding of Hubbard or Isaac. In Isaac the Court gave the reasoning behind disallowing appeals from a trial court's *denial* of a defendant's motion:

It is a bad practice, and generally condemned, to hear appeals by piecemeal, especially in criminal cases; for it is destructive of the prompt administration of justice, which is so essential to the peace of society. To allow appeals to be heard from such preliminary rulings would enable a party charged with the most serious crime always to secure a continuance, when otherwise not entitled to it, by simply moving to quash the indictment, and, when his motion is overruled, give notice of appeal from such ruling, and thereby stop the trial. . . .

Isaac, *supra*, quoting State v. Hughes, 56 S.C. 540, 35 S.E. 214, 215 (1900).

The underlying rationale behind Hubbard, Isaac, and other cases disallowing appeal from the denial of the defendant's motion simply do not apply here where Looper's motion was granted, the charges dismissed, and the State engaging the appellate process.

Appellate review is especially important here where circuit court reversed the magistrate's ruling without identifying any specific error of law or in the factual findings on the part of the trial magistrate. Nor did the circuit court identify the standard by which it reviewed the magistrate's ruling. A review of the record shows that the circuit court failed to apply the proper standard of review for

evidentiary rulings by a trial court. "In criminal cases, an appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001).

This Court overlooks the impact its termination of the appeal process, the practical effect of which only further shows the interlocutory order analogy to be flawed. The denial of a defendant's motion to suppress or dismiss in most cases will ultimately be reviewable in the exact same posture upon appeal from any subsequent trial and conviction. The magistrate's decision in Looper's case however, would not be reviewable in the same posture. This is a critical distinction this Court has overlooked, and is precisely why Looper's case does not involve a traditional interlocutory appeal. On the remand of this case the circuit court's reversal of the evidentiary ruling will be seen by the magistrate as binding. There will be no further hearing, findings or ruling by the magistrate. Even more likely, despite his initial findings as to credibility and facts, the magistrate may feel compelled to expressly change those findings and ruling on remand simply to be in accord with the circuit court's ruling. Either way, in the event of a subsequent appeal, Looper will be in a completely different position. Rather than defending an appeal under the "any evidence" standard of review in his favor, he will then be

appealing under an “any evidence” standard of review held against him. All presumptions and deference would then be against him, rather than in his favor, as they should be in the present appeal. As a clear practical matter, unlike the case with interlocutory orders, or orders that denied a defendant relief at trial, because Looper was granted relief by the magistrate, he will be harmed by the dismissal of this appeal.

This Court’s refusal to address the merits under the now existing standard of review, requiring deference to the magistrate’s ruling in Looper’s favor, will place Looper in a far more burdensome position than he otherwise would be now. Without any stated basis for the reversal of the magistrate’s evidentiary ruling, the circuit court has negated the magistrate’s credibility determination and factual findings. The circuit court did not enter any clear alternative findings, it has simply negated and erased the magistrate’s findings and determinations. In a retrial, the magistrate court will be forced to presume that it is unable to make any factual findings or credibility determinations that would require suppression of the evidence. The circuit court has thereby precluded further factual findings, especially those contrary to its decision. The circuit court has therefore impermissibly made findings of fact and determinations of credibility sitting in an appellate capacity.

If there are no further factual findings at trial on remand, and the magistrate is bound by the circuit court's implicit ruling on credibility and evidence, then any subsequent appeal by Looper will be against the standard of review and deference to the lower court. He will suffer a burden of proof he would not otherwise have in the present appeal. He is therefore clearly injured by the failure of this Court to address the case on its merits under the appropriate burden of proof and required deference to the magistrate as the case now sits.

In this case, the magistrate court is the trial court, and review of its evidentiary rulings are subject to the same standard of review by the circuit court on appeal as are the circuit court's evidentiary rulings on appeal to this Court. Sitting as an appellate court, the circuit court is required to give proper deference to the findings of fact by the magistrate and only reverse where findings are clearly erroneous, or there is an error of law. In Looper's case the trial magistrate's ruling turned on his findings of fact after hearing testimony and evidence regarding the suppression issue. The written order of the magistrate shows that the trial magistrate considered the evidence carefully and made specific findings of fact. Looper loses that position by this Court's dismissal of his action at this time.

The evidence before the magistrate in this case showed that Looper was stopped by a Greenville County deputy for speeding. The deputy asked for

Looper's driver's license and vehicle information. He also asked Looper if he had had anything to drink, which Looper indicated that he had not. The deputy took Looper's driver's license and vehicle information and returned to his patrol vehicle where he stayed from approximately twelve minutes before returning to Looper's car. The deputy issued two citations to Looper, one for speeding and one for an expired vehicle tag. The deputy then explained in great detail the maximum fines for each ticket and how Looper could remedy the expired vehicle tag citation. The deputy also advised Looper of the court date for the tickets and that Looper could pay the fines in advance to avoid appearing in court. It took approximately fifteen minutes for the deputy to conclude all of the foregoing and return Looper's license and paperwork. Instead of terminating the traffic stop, and allowing Looper to leave after issuing the tickets and returning all of his paperwork, the deputy continued Looper's detention and questioned him further. As a result of the this extended detention and continued questioning, Looper was subsequently arrested for driving under the influence.

At trial the defense moved to suppress evidence obtained through the continued detention and questioning of Looper past the point where the traffic stop should have ended under the Fourth Amendment. The deputy testified as to the details of the traffic stop and his continued detention of Looper. After hearing

the deputy's testimony, and reviewing the tape from the stop, the court granted the defense motion to suppress evidence obtained subsequent to what the magistrate held should have been the legitimate end of the traffic stop. The magistrate court's ruling was based on its finding that the evidence failed to establish reasonable suspicion for a continuation of the traffic stop and detention of Looper past the point that the deputy had issued the tickets, explained all of the things related to the tickets, and returned all of Looper's paperwork. As an inherent part of any evidentiary hearing, Looper's case involved the trial magistrate's determination as to credibility of the testimony and evidence. After a through review of all of the evidence, the trial magistrate found that the facts did not establish the requisite reasonable suspicion.

In deciding the appeal, a review of the circuit court's order shows that the circuit court failed to apply the appropriate appellate standard of review: "The admission of evidence is within the sound discretion of the trial court." State v. McLeod, 303 S.C. 420, 401 S.E.2d 175 (1991); State v. Groome, 274 S.C. 189, 262 S.E.2d 31 (1980). In Fourth Amendment cases, the circuit court's factual rulings are reviewed under the "clear error" standard. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). Under the "clear error" standard, an appellate court will not reverse a circuit court's findings of fact simply because it would

have decided the case differently. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct.App. 2005). In the present case the circuit court was required to affirm if there was any evidence to support the trial magistrate's ruling. See State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459-60 (2002). Here, the circuit court failed to apply the proper standard of review in Looper's case. And as is evident in the record, the magistrate had ample evidence to support his ruling.

In addition to there be being a factual basis supporting the magistrate's ruling in this case, the magistrate clearly applied the proper law to his findings of fact. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. Const. amend. IV. "[T]he Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention." Pichardo, 367 S.C. at 97, 623 S.E.2d at 847 (citing United States v. Mendenhall, 446 U.S. 544, 551, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)).

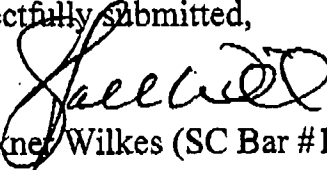
The trial magistrate clearly recognized reasonable suspicion as the proper standard for continued detention in Looper's case. "[R]easonable suspicion requires a particularized and objective basis that would lead one to suspect another of criminal activity." State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct.App. 2001). "In determining whether reasonable suspicion exists, the [circuit]

court must consider the totality of the circumstances.” State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct.App. 2007). Generally stated, reasonable suspicion is a standard that requires more than a "hunch" but less than probable cause. *Id.* A review of the trial magistrate’s order shows that the magistrate considered the evidence and applied the proper law to his findings of the facts. The magistrate expressly recognized the application of the Fourth Amendment, and specifically considered in his analysis the cases of State v. Williams, 571 S.E.2d 703 (SC Ct App. 2002) and State v. Rivera, 682 S.E.2d 307 (SC Ct App. 2009). The record therefore shows that there was evidence supporting the trial magistrate’s factual findings and, that the trial magistrate applied the proper law to those findings of fact. It was therefore error for the circuit court, sitting as an appellate court, to reverse the ruling of the magistrate. Dismissal of Looper’s appeal will improperly reverse the standard of review and deference to which Looper is presently entitled. Looper is clearly “aggrieved” by the circuit court’s decision as well as this Court’s dismissal of his action.

CONCLUSION

Based on the foregoing, the Petitioner moves this Court for a rehearing in this case.

Respectfully submitted,



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March 18, 2015.

APPEAL FROM GREENVILLE COUNTY
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SC Court of Appeals

Case No. 2011-CP-23-03563

State of South Carolina, Respondent,

v.

Andrew T. Looper, Appellant.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc*, and Certificate of Counsel on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 18th day of March, 2015, addressed as follows, and by facsimile:

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March 17, 2015

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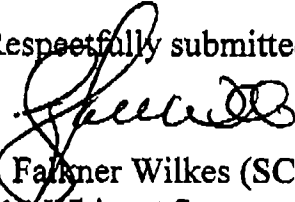
MAR 18 2015

SC Court of AppealsRe: State of South Carolina, Respondent v. Andrew T. Looper, Appellant
Case No.: 2011-CP-23-03563

Dear Ms. Kitchings,

Enclosed please find Mr. Looper's Petition for Rehearing and Suggestion for Rehearing en banc. I am also serving and filing the above, along with the Certificate of Service, by facsimile to meet the requirements of actual receipt by the end of the day March 18, 2015. I will also place the originals in the United States Mail today with its most expedient delivery. In the event that the mailing does not arrive before the deadline tomorrow, it is my understanding that the facsimile will suffice as long as the originals have been posted timely. Based on that understanding I will not have the originals hand delivered tomorrow. If my understanding is incorrect please let me know immediately upon your receipt of the facsimile of this letter and I will have the originals hand delivered tomorrow.

Respectfully submitted,


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