THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2008-CP-11-1038
Appellate Case No. 2013-001347

Christopher Drye, d/b/a Drye's Auto Crushing .....Respondent,

v.

Mike Gault and Mary T. Gault, d/b/a Gault's Used Cars, Total, Inc., Edward Keith Potter, Individually and as President of Total, Inc., ... Defendants,

Of whom,

Mike Gault is .....Appellant.

PETITION FOR REHEARING

The Court of Appeals filed its opinion in this matter on March 18, 2015. Appellant now petitions the Court pursuant Rule 221, SCACR, for rehearing on the grounds that the Court overlooked or misapprehended the following points.

First, there was no evidentiary support for the contempt decision and the trial court abused its discretion in finding Appellant Mike Gault in contempt of court. Specifically, there was no evidence that proved Appellant willfully and purposely failed to comply with a discovery order, which was the sole basis for the contempt motion. The record

must clearly and show the contemptuous conduct. The only evidence of record is that Appellant inadvertently failed to disclose three items he owned at the time the discovery response was made: (1) a nonworking forklift, (2) a 20 year old welder, and (3) and an old generator. All of these items were unused and not located on the premises where Appellant live. There was no evidence given at the hearing that Appellant willfully or purposely secreted these items. Other than that, it is clear that the trial court simply presumed, based upon general testimony of other witnesses, that Appellant must be hiding assets because he drives race cars for other people. There was no actual evidence of the sort. There is no competent testimony in the record to support a finding that Appellant willfully refused to answer the interrogatory at issue.

Second, the issue of whether the Court of Appeals applied the proper standard of review is a live issue preserved for appeal. The procedural posture of this appeal was complicated, but Appellant followed the rules to the letter, and has preserved his issues for determination by this Court.

At the conclusion of the contempt hearing on June 19, 2013, the trial court imposed a criminal contempt sentence on Appellant, directing that he be locked up at the Cherokee County Detention Center for a period of 10 days. The order directing this detention was handwritten on Appellant's Booking Report, to wit "hold for contempt order per Judge Hayes." (R. p. 387).

On June 21, 2013, two days into his incarceration, Appellant filed his Notice of Appeal and Emergency Petition for Writ of Supersedeas. Judge Cureton issued an Order on that date finding that Appellant's criminal contempt sentence was automatically stayed by the filing of the Notice of Appeal. (R. p. 12). The trial court, because of the appealed criminal sanction, issued an Order Bond and Discharge on June 24, 2013. (R. p. 12). The trial court thereafter issued a formal order on the contempt

hearing on August 6, 2013 that was forwarded to the Court of Appeals. (R. p. 1). If Appellant had not immediately appealed his criminal sanction, then he would have had to serve his 10 day contempt sentence with no recourse and would have abandoned his right to appeal because it would have become moot by the time the formal order was issued.

The formal order, which the trial court had time to reflect upon and issue, characterized the sanction as a "civil sanction." However, by this time, the Court of Appeals had sole jurisdiction over the matter. Further, the trial court had, in fact, imposed a criminal sanction, which was recognized by Judge Cureton in his June 21 Order and by Judge Hayes himself, when he ordered Appellant's release pending appeal on June 24. Stating otherwise in the Order did nothing to change that. Here is why:

The service of a notice of appeal divests the lower court of jurisdiction over the order appealed, and the appellate court then has exclusive jurisdiction. Rule 205, SCACR. While an order imposing a penalty for criminal contempt is stayed by an appeal, an order ruling a person in civil contempt **is not**. Wilson v. Walker, 340 S.C. 531, 532 S.E.2d 19 (Ct. App. 2000); Decker v. Smith, 322 S.C. 212, 471 S.E.2d 459 (1995). In Wilson, the Court of Appeals held that the appellant's contempt sanction was clearly criminal because, even though he could have avoided imprisonment by paying a fifty dollar per day sanction, he could not expunge the sanction itself. The purpose, then, was to punish for disobedience.

Likewise, here, it is clear from both the trial court's actions in incarcerating Appellant on the spot, and issuing the order bonding him out of jail pending the resolution of this appeal, that the sanction was criminal. If not, then the appeal would not have stayed the sentence. The court later referred to the sentence as "civil contempt," but the actual sanction simply was not. In the August 6, 2013 Order, the

court stated that punishment was "[t]he immediate sanction of 10 days of detention." There is absolutely nothing in the Order that would allow Appellant to expunge the contempt. If there had been, it would have properly been a sentence of civil contempt. There was not, and the sanction is criminal contempt, regardless of the label the trial court placed on it after the appeal had been docketed and Orders from the Court of Appeals and the trial court itself had been issued treating the sanction as what it was – a criminal contempt sanction.

In short, there was no way for Appellant to file any kind of motion for reconsideration to clarify the ruling because (1) the ruling was clearly one for criminal contempt and (2) the trial court did not characterize it as "civil" until after the appeal was pending and the Court of Appeals had exclusive jurisdiction.

Therefore, the trial court applied a clear and convincing standard in finding Appellant in criminal contempt of court, instead of the proper standard of beyond a reasonable doubt. (R. pp. 1, 256).

April 2, 2015

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Of whom,

Mike Gault is .....Appellant.

PROOF OF SERVICE

I, the undersigned, hereby certify that the Petition for Rehearing in the above referenced matter was mailed, postage prepaid, to Respondent's Attorney, William G. Rhoden, by sending to Winter & Rhoden, LLC, 221 E. Floyd Baker Blvd., Gaffney, SC 29340, on April 2, 2015.

SIGNATURE PAGE TO FOLLOW

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April 2, 2015

The Honorable Jenny Abbott Kitchings
SC Court of Appeals Clerk
PO Box 11629
Columbia, SC 29211

Re: Christopher Drye, d/b/a Drye's Auto Crushing, Respondent v. Mike Gault and Mary T. Gault, d/b/a Gault's Used Cars, Total Inc., Edward Keith Potter individually and as President of Total Inc., of Whom Mike Gault is Appellant.

Appellate Case No. 2013-001347

Dear Ms. Kitchings:

I enclose herewith an original and seven copies of Appellants' Petition for Rehearing and a Proof of Service showing service of the Petition on Respondent's Counsel William G. Rhoden, Esq. Please file the original and send a clocked copy back to me in the envelope I have enclosed for your convenience. I appreciate your assistance.

Sincerely,

Ginger D. Goforth

Enclosures
cc: William G. Rhoden, Esq.