

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

R. Lawton McIntosh, Circuit Court Judge

RECEIVED
SEP 18 2015
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

KELVIN JONES,

APPELLANT

APPELLATE CASE NO. 2015-000510

MOTION TO DISMISS APPEAL
WITHOUT PREJUDICE

The undersigned counsel respectfully requests the Court dismiss the above referenced appeal **without prejudice**. In support of this motion counsel submits the following:

1. An Aiken County Grand Jury indicted Appellant at the January 9, 2012 term of General Sessions for trafficking cocaine, 400 grams or more, and possession with intent to distribute cocaine within proximity of a school or park. His case was called to trial on February 17, 2015 before the Honorable R. Lawton McIntosh, and a jury. Assistant Attorneys General Megan Burchstead and Michael Ross represented the state, and Bakari Sellers and Alexandra Benevento represented Appellant.

2. On February 19, 2015, the jury found Appellant guilty. He was sentenced by Judge McIntosh to twenty-five years imprisonment and a \$200,000 fine for trafficking cocaine and ten years concurrent for the proximity offense.

3. On February 24, 2015, Appellant timely filed a Notice of Appeal with this Court.

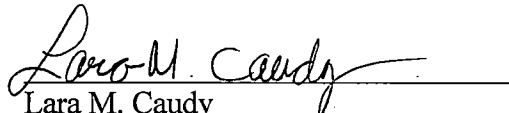
4. On February 26, 2015, two days after the Notice of Appeal was filed, Judge McIntosh contacted Appellant's trial counsel, Bakari Sellers, along with Assistant Attorney General Michael Ross and disclosed to the parties that it had come to his attention that the jury had tampered with the drug evidence during its deliberations. On that same day, defense counsel Sellers filed a motion for a mistrial based on the information disclosed by Judge McIntosh and requested a hearing on the matter.

5. On April 16, 2015, a hearing was held before Judge McIntosh on Appellant's motion for a mistrial. After hearing from the parties, Judge McIntosh ultimately issued a written order filed June 15, 2015. In his order, Judge McIntosh found there was "a need to further investigate the extent of any actions on the part of the jurors which led to the opening of the 'BEST Kit' containing the drug evidence in this case." The court indicated that "[s]uch investigation is necessary to determine whether there was any improper influence upon the jurors, or whether there was any resulting prejudice to the defendant." Therefore, the court ordered that a qualified individual at SLED examine the drug evidence to determine whether the evidence was accessed, handled, or tampered with by the jury during its deliberations. The court further ordered that SLED report its findings concerning the drug evidence to the court as soon as such findings are available. See Exhibit No. 1 (McIntosh Order filed June 15, 2015).

6. Upon information and belief, the trial court is still waiting for a report from SLED concerning its findings and has not made a ruling on Appellant's motion for a mistrial. Therefore, the post-trial motion is still pending.

Based on the above showing, undersigned counsel respectfully requests this Court dismiss Appellant's current appeal **without prejudice** to allow Judge McIntosh to rule on Appellant's post-trial motion. Once Judge McIntosh has ruled upon Appellant's post-trial motion for a mistrial, Appellant may then refile a notice of appeal with this Court and go forward with his direct appeal at that time. While this motion is pending, counsel respectfully request this Court hold the timelines for filing his initial brief of appellant and designation of matter in abeyance.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

September 18, 2015

EXHIBIT #1

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF GENERAL SESSIONS
OF THE SECOND JUDICIAL CIRCUIT

State of South Carolina,)

ORDER

vs.)

Warrant Number(s): I093303, I093304,
I093305

Kelvin Jones,)

Defendant.)

On February 19, 2015, the defendant was found guilty after a three-day jury trial held in Dorchester County on a change of venue from Aiken County, pursuant to The Honorable Edgar Dickson's order dated November 5, 2014. The Honorable Lawton McIntosh presided over the defendant's trial.

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
In Open Court Pursuant to the
Sessions for Aiken County, South Carolina do hereby certify
that the foregoing constitutes a true and correct copy of the
original document as the same has been filed in my office this

JUN 15 2015

On February 26, 2015, Judge McIntosh contacted Defendant's attorney along with Assistant Attorney General Michael Ross and disclosed that it had come to his attention that the jurors tampered with the drug evidence during their deliberations. Specifically, the seal of the bag or "BEST Kit" containing the cocaine had been ripped open. Defendant filed a timely Motion for a Mistrial on February 26, 2015 and requested a hearing. A hearing on Defendant's motion was held in Aiken County on April 16, 2015.

Liz Godard
C.C.P. & G.S. Clerk
Shannon D. Rosenkrantz
Deputy Clerk

After hearing from both sides regarding the defendant's motion, it is apparent that there is a need to further investigate the extent of any actions on the part of the jurors which led to the opening of the "BEST Kit" containing the drug evidence in this case. Such investigation is necessary to determine whether there was any improper influence upon the jurors, or whether there was any resulting prejudice to the defendant.

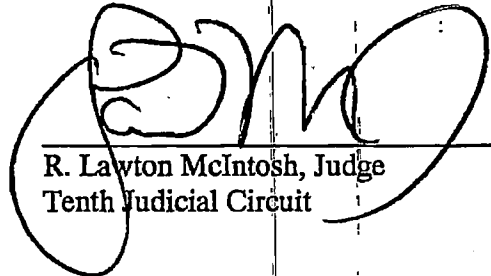
It is therefore ordered that:

FILED 15 JUNE 2015
Liz Godard
C.C.P. & G.S. Clerk
Shannon D. Rosenkrantz
Deputy Clerk

1 cert. copy - Bakari Sellers, Def. Atty. Assistant
1 cert. copy - Megan Burchstead, Atty General

- (1) A qualified individual at the South Carolina Law Enforcement Division (SLED) shall retrieve the drug evidence in this case from the Aiken County Clerk of Court to examine the evidence and its packaging.
- (2) SLED shall make a determination as to whether the drug evidence was accessed, handled, or tampered with. If SLED determines that there is evidence of access, handling, or tampering, SLED shall detail the extent of any access, handling or tampering.
- (3) SLED shall be responsible for the retrieval, transportation and custody of the drug evidence and shall maintain a clear chain of custody at all times.
- (4) SLED shall report its findings concerning the drug evidence in this case to this Court as soon as said findings are available.

AND IT IS SO ORDERED.



R. Lawton McIntosh, Judge
Tenth Judicial Circuit

This the 11th day of June, 2015
Anderson, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County

R. Lawton McIntosh, Circuit Court Judge

RECEIVED

SEP 18 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

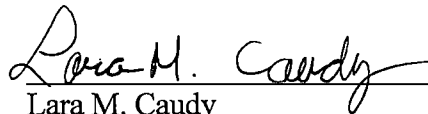
V.

KELVIN JONES,

APPELLANT

CERTIFICATE OF SERVICE

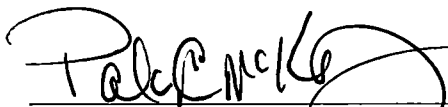
The undersigned attorney hereby certifies that a true copy of the Motion to Dismiss Appeal Without Prejudice in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of September, 2015.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of September, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

September 18, 2015

RECEIVED
SEP 18 2015
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: The State v. Kelvin Jones
Appellate Case No. 2015-000510

Dear Ms. Kitchings:

Enclosed are an original and six copies of the Motion to Dismiss Appeal Without Prejudice in the above referenced case. Thank you for your assistance in this matter.

Sincerely,

Lara M. Caudy
Appellate Defender

LMC/pcm