

RECEIVED

DEC 01 2015

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable Tanya A. Gee, Presiding Judge

2015-002331

THE STATE,

Respondent,

vs.

BRIAN TALKINGTON,

Appellant.

MEMORANDUM ON APPEALABILITY

Respondent, State of South Carolina, would respectfully show that this appeal must be dismissed as premature:

1. Appellant has been indicted but not yet tried for one count of Criminal Domestic Violence, 2nd Offense from an incident that took place on July 4, 2011.
2. On January 27, 2012, the Richland County Solicitor's Office moved to remand the case from General Sessions' Court to Magistrate Court as a Criminal Domestic Violence - 1st Offense after reconciling an error on the Appellant's rap sheet.
3. On April, 2012, the Appellant entered a request for a jury trial.
4. The first trial date was set for June 7, 2012, but was continued by the Appellant. The second trial date was set for October 17, 2012, but was again continued by the Appellant.

5. On February 13, 2013, the case proceeded to trial in magistrate court in front of Judge Edmond. After the jury was picked, but BEFORE it was sworn, the defense made a motion to dismiss, claiming that the charge was improperly remanded to the lower court. Judge Edmond agreed and concluded that he did not have jurisdiction to preside over the case .

6. On November 21, 2013, the State dismissed the Criminal Domestic Violence - 2nd Offense charge. A new warrant was drawn for Criminal Domestic Violence - 1st Offense and served on the Appellant.

7. On October 14, 2014, Judge Shealy heard pre-trial motions from the Appellant to dismiss the case based on double jeopardy. On October 16, 2014, the judge issued an order denying Appellant's claim, opining that "jeopardy does not attach in a proceeding where the court lacks jurisdiction." (see attached Order dated October 16, 2014)

8. On October 23, 2014, the Appellant filed a Motion for Reconsideration with Judge Shealy. The motion was heard on November 14, 2014.

9. On November 17, 2014, Judge Shealy issued a second order that was consistent with his 10/16/2014 Order and specifically stating that "Even if it was undisputed that the jury had been sworn, State v. Whetstone makes it clear that Defendant's double jeopardy argument is without merit, as jeopardy does not attach in a proceeding where the court lacks jurisdiction. Therefore, I find no prejudice to the Defendant from the loss of the tape." (see attached Order dated November 17, 2014).

10. On September 9, 2015, the Honorable Tanya A. Gee, Circuit Court Judge heard oral arguments from the parties. On October 12, 2015, Judge Gee issued an order denying ALL of appellant's claims and affirming Judge Shealy's orders from October 14, 2014 and November 17, 2014.

11. Specifically, Judge Gee ruled that Double Jeopardy did not attach; that the lack of a transcript was immaterial to the case at point, and that the State was not estopped from

prosecuting the appellant for Criminal Domestic Violence of a High and Aggravated Nature.

12. On October 12, 2015, the appellant filed a Motion for Reconsideration with the Circuit Court.

13. On October 26, 2015, Judge Gee issued an Order Denying Appellant's Motion for Reconsideration.

14. The State submits that Appellant's appeal must be dismissed as premature. "In South Carolina, a criminal defendant may not appeal until sentence has been imposed." State v. Miller, 289 S.C. 426, 336 S.E.2d 705 (1986). "Consistent with this rule, an order denying a double jeopardy claim is not immediately appealable." *Id.* Our supreme court has specifically stated, "it is a bad practice, and generally condemned, to hear appeals by piecemeal, especially in criminal cases [...]. 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 [...] and thereby stop the trial...". State v. Huges, 56 SC 540, 35 S.E. 214, 215 (1900).

6. Accordingly, Appellant's appeal must be dismissed at this time as premature.

WHEREFORE, the State submits the appeal must be dismissed because Appellant appeal is not immediately appealable.

Respectfully submitted,

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

DANIEL R. GOLDBERG

Deputy Solicitor

JOSEPH Y. SHENKAR

Assistant Solicitor

1701 Main St. 3rd Floor

Columbia, South Carolina 29201

(803) 576-1800

BY: 

Joseph Y. Shenkar

Fifth Judicial Circuit Solicitor's Office

1701 Main St. 3rd Floor

Columbia, South Carolina 29201

(803) 576-1800

ATTORNEYS FOR RESPONDENT

November 30, 2015

November 30, 2015

RECEIVED

DEC 01 2015

SC Court of Appeals

VIA HAND DELIVERY

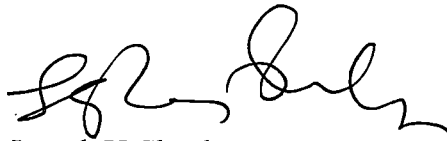
The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: State of South Carolina v. Brian Talkington
2015-002331

Dear Ms. Kitchings:

Enclosed for filing are the original and four copies of the Respondent's Memorandum on Appealability in the above-referenced case.

Sincerely,



Joseph Y. Shenkar
Assistant Solicitor

JYS/
Enclosures

cc: Neal D Truslow, Esquire
Douglas N. Truslow, Esquire

Neal D Truslow, Esquire
Douglas N. Truslow, Esquire
P. O. Box 1465
Columbia, South Carolina 29202