STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County
Alexander S. Macaulay, Circuit Court Judge

THE STATE,

Appellant,

vs.

KENNY RAY HARRIS,

Respondent.

FINAL BRIEF OF APPELLANT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

W. WALTER WILKINS
Solicitor, Thirteenth Judicial Circuit

305 E. North Street, Ste. 325
Greenville, SC 29601

ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The circuit court erred in reviewing the magistrate's order reinstating the ticket for criminal domestic violence because the ruling restoring the ticket to the docket was not immediately appealable and the circuit court did not have appellate jurisdiction to review the magistrate's ruling.

STATEMENT OF THE CASE

Respondent Kenny Ray Harris was arrested and charged with criminal domestic violence under uniform traffic ticket number 32468 FS issued on July 11, 2014, by Pickens County Sheriff's Deputy Roper. R. p. 1. The case came before the Honorable Magistrate Ben Dow in Pickens County on July 23, 2014. The victim and Harris were present. However, Deputy Roper did not appear. Magistrate Dow dismissed the case for failure to prosecute. See Magistrate's Response, R. pp. 10-11. The State filed a motion for reconsideration and provided an accompanying affidavit on August 4, 2014. The Magistrate issued a summons for the hearing on August 7, 2014. R. p. 11.

A hearing on the matter was held on August 18, 2014, at which time Magistrate Dow reinstated the charge. Harris filed an interlocutory appeal. Oral argument on the matter was heard before the Honorable Alexander S. Macaulay on February 2, 2015. Following oral argument, Judge Macaulay reversed Magistrate Dow's grant of the motion for reconsideration by order dated February 27, 2015. R. pp. 21-23. This order was filed on March 9, 2015, and received by the State on April 1, 2015. R. p. 24. The State moved for reconsideration of the motion on April 2, 2015. Judge Macaulay denied the motion by order dated April 23, 2015. R. pp. 28-31. The State appealed to this Court on May 18, 2015.

ARGUMENT

The circuit court erred in reviewing the magistrate's order reinstating the ticket for criminal domestic violence because the ruling restoring the ticket to the docket was not immediately appealable and the circuit court did not have appellate jurisdiction to review the magistrate's ruling.

The circuit court erred in reversing Magistrate Dow's reinstatement of the CDV ticket because Magistrate Dow's reinstatement of the ticket was not immediately appealable. Because the order reinstating the charge was not immediately appealable, the circuit court lacked appellate jurisdiction.

The State raised the issue of appealability to the circuit court in the State's motion to reconsider.[1] R. pp. 24-25. The appealability of an order may be raised at any time. Levi v. Northern Anderson County EMS, 409 S.C. 374, 379, 762 S.E.2d 44, 47 (Ct. App. 2014). "An appellate court may dismiss an appeal or error proceeding on its own motion where it appears from the record that the court is without jurisdiction or that the judgment sought to be reviewed is not final, among numerous other reasons, even though no objection is raised by the opposite party." Berry v. Zahler, 220 S.C. 86, 89, 66 S.E.2d 459, 460 (1951) *quoted*

[1] In denying the motion to reconsider, the circuit court relied on State v. Dendy, 158 S.C. 15, 155 S.E. 150 (1930) to argue that because the ticket was dismissed, it could not be reinstated. Dendy has no application to the present case. In Dendy, the warrant was dismissed and then amended but not reinstated. In the instant case, the ticket was dismissed and then reinstated with a motion filed within the ten day limit pursuant to Rules 4 and 29 SCRCrimP. Accordingly, it was within the trial court's discretion to reinstate the charge. The magistrate in Dendy simply never reinstated the charge. Further, Dendy addressed a defect in the warrant; the warrant failed to charge a crime. In the instant case, the original dismissal was not based on sufficiency of the charging documents, but for failure to prosecute. This analysis is unnecessary to reach, since the circuit court lacked appellate jurisdiction to consider these issues.

with approval by Levi, 409 S.C. at 379, 762 S.E.2d at 47. "South Carolina . . . has made clear appellate jurisdiction can be raised by appellate courts even if none of the parties have raised it." Levi, 409 S.C. at 380, 762 S.E.2d at 47.

In Levi, a workers' compensation case, the employer appealed the single commissioner's denial of the employer's motion to dismiss to the Appellate Panel. The Appellate Panel reversed the single commissioner's order and dismissed Levi's claims. Levi then appealed to this Court and raised the issue of whether the single commissioner's order was immediately appealable. Even though Levi never raised appealability to the Appellate Panel, this Court found it could address the issue "because appealability may be raised at any point." Id. at 380, 762 S.E.2d at 47. This Court reversed the Appellate Panel's order because the single commissioner's order was not immediately appealable. This Court remanded the matter to the Appellate Panel with instructions to dismiss the employer's appeal. Id. at 385, 762 S.E.2d at 50-51.

Likewise, in the instant case, the circuit court should have dismissed Harris' appeal because the Magistrate's decision restoring the case to the docket was not immediately appealable. "[G]enerally, a criminal defendant may not appeal until sentence is imposed." State v. Isaac, 405 S.C. 177, 181, 747 S.E.2d 677, 679 (2013); see State v. Looper, 412 S.C. 363, 772 S.E.2d 516 (Ct. App. 2015) (finding a circuit court order that reversed the magistrate's suppression of a video recording and dismissal of a DUI charge was not immediately appealable).

An interlocutory order is immediately appealable only if it involves the merits of the case or affects a substantial right. S.C. Code § 14-3-330. "The decision on a motion to

restore the case to the active docket is not a final judgment and is interlocutory and, therefore, not immediately appealable." Shields v. Martin Marietta Corp., 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991). "Avoidance of trial is not a 'substantial right' entitling a party to immediate appeal of an interlocutory order." Id.

Of course, the ticket was dismissed before any trial occurred, so double jeopardy is not an issue, notwithstanding language in the circuit court's order. However, even a claim of double jeopardy is not immediately appealable. State v. Miller, 289 S.C. 426, 426-27, 346 S.E.2d 705, 705-06 (1986).

In the instant case, the State raised the issue of appellate jurisdiction to the circuit court in its motion for reconsideration. Because the issue of appealability may be raised at any time – for the first time in this brief even – the circuit court should have dismissed Harris' appeal once the issue was brought to the circuit court's attention. This Court should remand to circuit court with instructions to dismiss Harris' appeal from Magistrate's Court and the ticket should be restored to the docket.

CONCLUSION

For all of the foregoing reasons, this Court should remand this case to circuit court with orders to dismiss Respondent's appeal and restore the charge to the Magistrate's Court docket.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

W. WALTER WILKINS
Solicitor, Thirteenth Judicial Circuit

305 E. North Street, Ste. 325
Greenville, SC 29601

BY: _____
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

January 22, 2016

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

By: _____
DAVID SPENCER
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Appellant on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Steven L. Alexander, Esquire, P.O. Box 618, Pickens, SC 29671.

I further certify that all parties required by Rule to be served have been served.

This 22ND day of January, 2016.

NORMA BIGBEE
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727