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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Honorable J. Ernest Kinard, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

Appellant,

vs.

BLAKE THOMAS JENKINSON,

Respondent.

MEMORANDUM ON APPEALABILITY

The State of South Carolina, Appellant, would respectfully show that this appeal is properly before the South Carolina Court of Appeals:

1. On June 29, 2013, Respondent was charged with simple possession of marijuana.
2. On April 29, 2014, the State and Respondent appeared before the Honorable Donald Simons at a pre-trial hearing before either jurors or witnesses were sworn;
3. Over the State's objection, the Trial Court granted Respondent's motions to suppress evidence and to dismiss the case.
4. On May 8, 2014, the State timely filed the Notice of Appeal with the Fifth Judicial Circuit of Common Pleas;
5. On February 6, 2015, the Honorable J. Ernest Kinard, Jr., presided over the appeal at the

Circuit Court level;

6. The Honorable Judge Kinard affirmed the Trial Court's holding that the evidence should be suppressed and the case dismissed;
7. On February 10, 2015, the State timely filed the Notice of Appeal with the South Carolina Court of Appeals.
8. The State and Respondent submitted Final Briefs.
9. This Court requested memoranda addressing the issue of appealability;
10. The State submits that the Appeal is properly before the South Carolina Court of Appeals because the matters on appeal were sufficiently preserved and the appeal is a permissible interlocutory appeal.
11. In South Carolina, the State's right to appeal in a criminal case is a judicially created right, not a statutorily created right. *State v. McKnight*, 287 S.C. 167, 168, 337 S.E.2d 208 (1985), *see also State v. Belviso*, 360 S.C. 112, 113, 600 S.E.2d 68, 69 (Ct. App. 2004).
12. In order for an issue to be preserved for appeal, it must have been "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *Lapp v. S.C. Dept. of Motor Vehicles*, 387 S.C. 500, 507, 692 S.E.2d 565, 569 (Ct. App. 2010) (citing *S.C. Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007));
13. The State raised the issues on appeal in a timely and sufficiently specific manner. During the pre-trial hearing, Respondent moved to suppress the evidence and dismiss the case. Respondent claimed that the chemical analysis, chain of custody, and any testimony by witnesses had to be suppressed because such evidence failed to comply with Rule 6, SCRCrimP; and that failure to comply with Rule 6 required dismissal of the case. (R. pp. 1-

3).

14. The State timely objected by arguing that the State was in compliance with case law and Rule 6 since the State would present witnesses to address any perceived evidentiary shortcomings *at trial*. (R. pp. 2-3).

15. The Trial Court granted Respondent's motion to suppress and dismiss. (R. p. 3). On appeal at the Circuit Court level, the State, again, timely and sufficiently argued that the dismissal was premature because case law and Rule 6 permit the State to present witnesses regarding the chemical analysis and chain of custody *at trial*. (R. p. 8). The State clearly explained that Respondent's motions were argued and ruled upon during a *pre-trial* hearing before any jurors or witnesses were sworn; and that jeopardy did not attach. (R. p. 7, 9). Furthermore, the State argued that the sufficiency of evidence "is a matter to be left for a trial judge or for a jury" at trial, not during pre-trial motions. (R. p. 9). The State closed its argument by requesting the Circuit Court reverse the Trial Court and allow the case to proceed forward with trial. *Id.* Respondent argued that because the chemist was not present in the courtroom during the motion, the Trial Court dismissed the case. (R. p. 10). Additionally, Respondent stated that the chemical analysis and chain of custody forms were inadequate. *Id.* The Circuit Court interjected "And apparently their chemist did not have his statement, such as it was, notarized?" to which Respondent replied "Yes, sir." *Id.* At that time, the Circuit Court affirmed the Trial Court. *Id.* The State attempted to object and the Circuit Court replied "Rule says that they have to have it notarized." (R. p. 11). The State objected again by stating that Rule 6 was merely an optional method for the State to evidence the chemical analysis and chain of custody. *Id.* The Circuit Court affirmed the Trial Court. *Id.*;

16. As such, the State submits that it timely raised the matters on appeal and did so in a sufficiently specific manner;

17. Ordinarily, an appeal becomes ripe only "after a party has obtained a final judgment." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005); *see also Lapp*, 387 S.C. at 507, 692 S.E.2d at 569 (citing *S.C. Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007)).

18. However, the State may directly appeal a magistrate's pre-trial order where such ruling "precludes or significantly impairs the prosecution of a criminal case." *State v. Belviso*, 360 S.C. 112, 113, 600 S.E.2d 68, 69 (Ct. App. 2004); *see also State v. Mabe*, 306 S.C. 355, 358, 412 S.E.2d 386, 388 (1991).

19. An appeal is properly before courts sitting in appellate jurisdiction as a permissible interlocutory appeal, even if the charge was not dismissed or a trial not commenced. *See State v. Belviso*, 360 S.C. 112, 113, 600 S.E.2d 68, 69 (Ct. App. 2004); *see also State v. Mabe*, 306 S.C. 355, 358, 412 S.E.2d 386, 388 (1991).

20. The South Carolina Supreme Court has held that the Appellate Courts assume jurisdiction over such appeals in accordance with South Carolina Code subsection 14-3-330(2)(a) (1976). *Mabe*, 306 S.C. at 358, 412 S.E.2d at 388, *see also McKnight*, 287 S.C. at 168 , 337 S.E.2d at 209.

21. In pertinent part, subsection 14-3-330(2)(a) provides that where "[a]n order affecting a substantial right made in an action . . . in effect determines the action and . . . discontinues the action," the State may immediately appeal to courts sitting in appellate jurisdiction. S.C. Code Ann. § 14-3-330(2)(a); *see also McKnight*, 287 S.C. at 168, 337 S.E.2d at 209.

22. Moreover, South Carolina Courts have specifically recognized that orders suppressing State's evidence may be directly appealable in accordance with subsection 14-3-330(2)(a).

23. Similar to the instant case, *State v. Mabe* concerned the suppression of drug evidence during a pre-trial hearing due to the trial court's incorrect application of Rule 6, SCRCrimP. 306 S.C. 355, 412 S.E.2d 386 (1991). The trial court ordered the suppression of the drug analysis, testimony, and any other evidence because the court perceived Rule 6(d) as mandating that a defendant be allowed to have an independent expert test the drugs. *Id.* The State appealed the trial court's order. *Id.* The South Carolina Supreme Court held that the Court had jurisdiction over the State's appeal per subsection 14-3-330(2)(a) because the pre-trial order granting the suppression of the drug evidence "significantly impairs the prosecution." *Id.* at 358, 412 S.E.2d at 388.

24. In *State v. Belviso*, during a pre-trial hearing, the magistrate judge ordered the suppression of evidence relating to a charge for driving under the influence and dismissed the open container charge because the State did not preserve the container. 360 S.C. 112, 600 S.E.2d 68 (Ct. App. 2004). The State appealed the trial court's rulings to suppress the DUI evidence and to dismiss the open container charge. *Id.* The South Carolina Court of Appeals held that the circuit court had jurisdiction to hear the State's appeal because the trial court's rulings "would preclude prosecution" for the open container charge and "significantly impair" the State from moving forward with the driving under the influence charge since critical evidence was suppressed. *Id.* at 114, 600 S.E.2d at 69.

25. In *State v. Samuel*, the South Carolina Supreme Court distinguished between permissible and impermissible interlocutory appeals based upon suppression of evidence during a pre-trial hearing. 411 S.C. 602, 769 S.E.2d 662 (2015). The trial court ordered the

suppression of a specific statement made by a defendant during a polygraph test. *Id.* The State appealed the ruling. *Id.* The Supreme Court held that the ruling was not immediately appealable because the State had successfully admitted into evidence other, additional statements made by the defendant that "supplied essentially the same information and confession as [the suppressed statement]"; thus, the suppressed statement "did not significantly impair" the prosecution's case. *Id.* at 605, 769 S.E.2d at 66.

26. In the instant case, the State submits that this appeal is a proper interlocutory appeal in compliance with subsection 14-3-330(2)(a) and South Carolina case law. During the pre-trial motion, the Trial Court ordered the suppression of the chemical analysis, chain of custody, and testimony, and dismissed the case. Similar to *State v. Mabe*, the Trial Court erred as a matter of law in granting the motion to suppress by misapplying subsections of Rule 6, SCRCrimP. In so doing, the Trial Court significantly impaired the State from moving forward with prosecution because the Trial Court suppressed critical evidence – without the chemical analysis, chain of custody and testimony, the State's case is eviscerated. Moreover, the Trial Court dismissed the case, thus discontinuing the action and precluding further prosecution. *See* S.C. Code Ann. § 14-3-330(2)(a).

27. The State's case is readily distinguishable from *State v. Samuel* because the Trial Court and Circuit Court's misapplication of Rule 6, SCRCrimP, and subsequent orders for suppression and dismissal, barred the State from presenting critical evidence and from moving forward with a trial. The Trial Court suppressed all drug-related evidence, making it impossible for the State to move forward; whereas, the lower court in *Samuel* only suppressed part of the evidence and the prosecution was able to prove its case through other evidence.

WHEREFORE, the State respectfully submits the appeal was properly preserved and is properly before the Court of Appeals.

Respectfully submitted,

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

KRISTEN A. BALES
Assistant Solicitor, Fifth Judicial Circuit

ATTORNEYS FOR APPELLANT

BY: Kristen A. Bales

KRISTEN A. BALES
Assistant Solicitor, Fifth Judicial Circuit
1701 Main Street, Suite 302
Columbia, SC 29201
803-576-1800

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PROOF OF SERVICE

I, Kristen Bales, certify that I have served the *Memorandum on Appealability on* Respondent by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

S. Jahue Moore, Esquire
Post Office Box 5709
West Columbia, South Carolina 29171.

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

This 21st day of March, 2016.

Kristen A. Bales

KRISTEN A. BALES
Assistant Solicitor, Fifth Judicial Circuit
1701 Main St., Suite 302
Columbia, SC 29201
(803) 576-1800

Attorney for Appellant