

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2011-CP-10-3207

City of Charleston,.....Respondent,

v.

Jacob A. Stone,.....Appellant.

REPLY TO RESPONDENT'S
MOTION TO DISMISS

RECEIVED

OCT 29 2012

SC Court of Appeals

THOMAS J. RODE

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ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE

On January 30, 2010, the Appellant, Jacob A. Stone, was charged with Driving Under the Influence (DUI) by the City of Charleston Police Department. In February, 2011 the Honorable Joseph Mendelsohn granted Appellant's Motion to dismiss on double jeopardy grounds. The City (Respondent) appealed to the Circuit Court which reversed Judge Mendelsohn's ruling and remanded the matter to the Municipal Court (trial court) on January 3, 2012. Appellant timely filed a motion to reconsider which the Circuit Court denied. This appeal follows.

BACKGROUND

On January 30, 2010, Appellant was charged with Driving Under the Influence. On April 21, 2010, without notice the Clerk of Court for the City of Charleston entered a judgement of guilty against the Appellant. Upon learning of this, the matter was reopened and Appellant subsequently filed a motion to dismiss on the grounds of double jeopardy. On February 16, 2011, the Magistrate Court held a hearing on Appellant's motion to dismiss the charge of DUI. Respondent's only opposition to Appellant's motion was to argue that jeopardy had not attached because a jury had not been sworn and a trial had not started, an argument which the trial court rejected.

When the trial court announced its intention to grant Appellant's motion to dismiss. Respondent asked for additional time to develop further argument against the motion. The trial court granted Respondent one week: "I'm going to give him a week and let him tell you or me why [I] shouldn't [dismiss it]." The Court set a deadline of noon on February 23, 2011, for Respondent to reply:

I'm going to give you until noon on the twenty-third to have a chance to take a look at it, if we need another hearing we'll have it, if not, we're not going to have it, we don't need it. This is yours

[(Appellant's)]because I'm going to rule that the case needs to be dismissed unless he's [(Respondent)] got something that changes my mind.

Respondent concedes that it took no further action and advanced no further argument and as the trial court indicated, Appellant's motion to dismiss was granted. On March 14, 2011, Respondent filed an *untimely* motion to reconsider the Municipal Judge's Order dismissing the charge, which raised arguments not previously presented to the trial court.¹ On March 18, 2011, the trial court denied the motion.

Without notice to Appellant, on March 24, 2011, Respondent filed an *untimely* Notice of Intent to Appeal with the City of Charleston Municipal Court. Respondent's untimely notice of appeal was also procedurally defective as it was not served on Appellant until April 21, 2011, via email.²

Nonetheless, the circuit court held a hearing on Respondent's appeal on November 22, 2011, in the Court of Common Pleas. In addition to contesting the merits of the appeal, Appellant argued that the appeal was procedurally barred/defective, waived by Respondent, or otherwise not preserved for appellate review - arguments he maintains on appeal to this Court.

On January 3, 2012, the circuit court issued an order reversing and remanding the matter to municipal court for trial based on arguments never before raised. Appellant filed a motion to

¹ Arguments regarding timeliness and issue preservation were raised by Appellant when Respondent initiated the appellate process in the Circuit Court and Appellant maintains these arguments in its brief before this court on the merits of this appeal.

² Arguments regarding timeliness and procedural defects were raised by Appellant when Respondent initiated the appellate process in the Circuit Court and Appellant maintains these arguments in its brief before this court on the merits of this appeal.

reconsider which the circuit court denied and appeal to this Court followed.

Although initiating the appellate process by appealing the Municipal Judge's dismissal of the case, the Respondent now requests this Court dismiss the appeal that Appellant has taken from the Circuit Court.

ARGUMENT

I.

Respondent's position, as best Appellant understands, is that Appellant's appeal is either not appealable or not ripe. However, Respondent's position is nonsensical and fundamentally counter to our appellate process. This Court need not go beyond the first sentence of Respondent's argument to see it is without merit. Here Respondent asserts: "A criminal defendant may not appeal from a summary court proceeding until a final judgment has been rendered, i.e., he is convicted and sentence is imposed. . . . Moreover an order denying a double jeopardy claim is not immediately appealable. . . . Therefore, . . . this appeal is premature." See Respondent's Motion to Dismiss with Legal Authority, Sec. II, p. 2.

Respondent relies upon State v. Gregorie, 339 S.C. 2, 4, 528 S.E.2d 77, 77 (2000) for this assertion. However, Gregorie specifically guaranteed the right of a criminal defendant to subsequent appeals in a matter which originated in summary court - the precise right Respondent now asks this Court to foreclose.

The Gregorie Court was explicit in finding that in a case originating in magistrates court, the "final sentence requirement . . . is a prerequisite to the right to appeal **to the circuit court**. Once that court [i.e., the circuit court] renders its final judgement, the right to further appellate review is controlled by statute: **Any aggrieved party may appeal the circuit court's final judgment.** S.C.

Code Ann. § 18-1-30” Gregorie, 339 S.C. at 4, 528 S.E.2d at 77 (emphasis added).

Generally, a defendant cannot take appeal from the magistrates court (i.e., the trial court) until a final judgment is rendered. However, Respondent seems to neglect that this is **not** an appeal from the trial court. This is an appeal from an intermediate appellate court. Thus, the right to successive appeal is governed by S.C. Code Ann. § 18-1-30.

Respondent would have this Court create a rule of procedure which would only permit further appeal in cases in which the State receives an unfavorable ruling but not when the State is successful. Essentially, Respondent asks this Court to interpret the language of section 18-1-30 of the South Carolina Code which reads “any aggrieved party may appeal” to actually mean “only the State may appeal.” Such an interpretation is unnecessary as the statute is unambiguous and without legal support. State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004) (The cardinal rule of statutory interpretation is to determine the intent of the legislature and the he legislature's intent should be ascertained primarily from the plain language of the statute).

II.

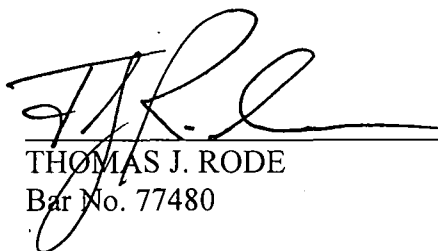
Ostensibly, Respondent asks this Court to dismiss the current appeal because it takes the position there has been no “conviction.” However, as this appeal presents a question regarding double jeopardy, whether there has been a “conviction” is precisely one of the issues on appeal. And Appellant maintains in its brief that this particular issue was not properly preserved or was otherwise abandoned by Respondent prior to the first appeal to the Circuit Court. In essence, Respondent is attempting an end run around appellate procedure in the hopes of avoiding the rules of issue preservation. In asking for dismissal for the same reason it would assert that the Double Jeopardy

Clause was not violated, Respondent has, by its own hand, demonstrated that it is impossible to separate the basis for this motion from the merits of the appeal. Thus, to grant Respondent's Motion to Dismiss, this Court would be required to address the merits of the appeal, not the least of which would be for this Court to address Appellant's contention that Respondent's argument regarding a lack of "conviction" was not properly before the Circuit Court. Such a determination is premature without this Court's review of the record on appeal or the briefs of the parties.

CONCLUSION

For the reasons above, this Court must deny Respondent's Motion to Dismiss.³

Respectfully Submitted,



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Charleston, South Carolina

October 23, 2012

³With leave of the Court Appellant would request oral argument on Respondent's motion if the Court deems it necessary.

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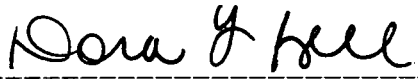
Jacob A. Stone,.....Appellant.

PROOF OF SERVICE

The undersigned certifies that a copy of Appellant's Reply to Respondent's Motion to Dismiss has been served upon the following, by mailing a copy, property addressed with sufficient postage affixed thereto, this 23rd day of October, 2012:

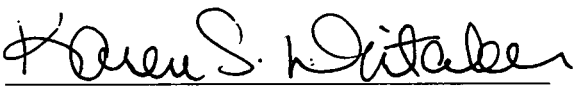
Mark J. Bourdon, Esquire
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DORA L. BELL

SWORN to and SUBSCRIBED before me
this 23rd day of October, 2012.



Notary Public for South Carolina
My Commission Expires: 4.4.22

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SC Court of Appeals

ANDREW J. SAVAGE, III
Certified Criminal Trial Advocate - NBTA

J. SCOTT BISCHOFF, II
DONALD L. MCCUNE, JR.

October 23, 2012

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, SC 29211

RE: City of Charleston v. Jacob Stone
Case Number: 2011-CP-10-3207

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of our Reply to Respondent's Motion to Dismiss, along with the Certificate of Service. Please the original and six copies with the Court and return one filed copy to me in the envelope that I have provided.

With best wishes, I remain

Sincerely,



Dora L. Bell
Paralegal to Thomas J. Rode
/dlb

Enc: Reply to Respondent's Motion to Dismiss (original and six copies)
Self-addressed, stamped envelope

cc: Mark J. Bourdon and Melinda A. Lucka (with document enclosed)
Mr. Jacob Stone (with document enclosed)