

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2016-000875

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SC Court of Appeals

THE STATE,APPELLANT,

v.

SEAN ROBERT KELLY,RESPONDENT.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I.

The current case is appealable and not violative of the Double Jeopardy Clause.

Respondent contends the order of the magistrate is unappealable because the State may not appeal from a directed verdict of not guilty. Initially, Respondent declined to raise this issue on appeal to the circuit court and it is therefore unpreserved. *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) (“An argument that is not raised to an intermediate appellate court is not preserved for review by this Court.”); *see also State v. Varvil*, 338 S.C. 335, 339, 526 S.E.2d 248, 250 (Ct. App. 2000) (noting constitutional arguments are not excepted from preservation rules). Although Respondent is correct that *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), acknowledges an appellate court may consider additional sustaining grounds which were not argued below, it is clear this discretion should not promote the erosion of well-settled tenets of preservation. Instead, our Supreme Court indicated that it “likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal,” and thus would decline the invitation to entertain an issue that should properly have been raised to the previous tribunal. *Id.* at 421, 526 S.E.2d at 724; *see id.* (“Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.”). Accordingly, the Court should decline to address this issue because it is not preserved.

Regardless of preservation, Respondent’s argument fails on the merits. “The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth, provides that no person shall ‘be subject for the same offence to be twice put in jeopardy of life

or limb.” *Brown v. Ohio*, 432 U.S. 161, 164 (1977). Accordingly, it bars the State from prosecuting a defendant for the same offense after acquittal or conviction. *State v. Easler*, 327 S.C. 121, 129, 489 S.E.2d 617, 622 (1997). “In a nonjury trial, jeopardy attaches when the court begins to hear evidence.” *Serfass v. United States*, 420 U.S. 377, 388 (1975). However, “[t]he conclusion that jeopardy has attached . . . begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial.” *Martinez v. Illinois*, 134 S. Ct. 2070, 2075 (2014) (internal quotations marks omitted) (citations omitted). “The remaining question is whether the jeopardy ended in such a manner that the defendant may not be retried.” *Id.* There is no doubt the State may not appeal from a directed verdict of not guilty. *State v. McKnight*, 353 S.C. 238, 239, 577 S.E.2d 456, 457 (2003) (“[W]e have long recognized that the State has no right of appeal from a judgment of acquittal in a criminal case” (emphasis removed) (internal citation omitted)). This is true even where a magistrate committed a legal error in granting the acquittal. *See State v. Tillinghast*, 375 S.C. 201, 203, 652 S.E.2d 400, 401 (2007) (“Whether or not the magistrate erred in his ruling of law, appellant was acquitted and is now out of court. The circuit court erred by finding the State may appeal the magistrate’s ruling.”).

Where Respondent fails in his argument is in his misguided assumption that he was acquitted. The United States Supreme Court has clarified that an acquittal “encompass[es] any ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense.” *Evans v. Michigan*, 133 S. Ct. 1069, 1074–75 (2013). This definition would include “a ruling by the court that the evidence is insufficient to convict, a factual finding [that] necessarily establish[es] the criminal defendant’s lack of criminal culpability, and any other rulin[g] which relate[s] to the ultimate question of guilt or innocence.” *Id.* at 1075 (alterations in original) (internal quotation marks omitted). However, these factual rulings are differentiated from mere

procedural endings to a case, such as “rulings on questions that are unrelated to factual guilt or innocence, but which serve other purposes, including a legal judgment that a defendant, although criminally culpable, may not be punished because of some problem like an error with the indictment.” *Id.* (internal quotation marks omitted) (citation omitted).

In this instance, the magistrate dismissed the case under a purely procedural rationale. As the magistrate’s order makes plain, he found “the state failed to produce a video in compliance with Section 56-5-2953(A), and none of the exceptions of Section 56-5-2953(B) apply.” (Magistrate’s Return.) He thus concluded that based on that deficiency, “the court must dismiss this prosecution.” (Magistrate’s Return.) Respondent even admits, as he must, that “the magistrate did not specifically rule on the evidence presented by the State and whether the State proved the *corpus delicti* of driving under the influence.” (Resp’t’s Br.6.) It is unclear how a decision that indisputably fails to comment on the sufficiency of the evidence can be characterized as an acquittal. Accordingly, his case is distinguishable from *Tillinghast* and *Horry Cnty. v. Parbel*, 378 S.C. 253, 662 S.E.2d 466 (Ct. App. 2008) *overruled on other grounds* by *State v. Oxner*, 391 S.C. 132, 705 S.E.2d 51 (2011), which he cites in his brief, as both address situations expressly involving an *acquittal*, not dismissals.¹ In both cases, the magistrate’s rulings involved substantive holdings that reflected the court’s consideration of the quantum of evidence presented. *See Tillinghast*, 375 S.C. at 202, 652 S.E.2d at 401 (holding Double Jeopardy Clause barred an appeal where “the magistrate granted appellant's motion for a directed verdict on the ground [that the statute under which he was indicted] was unconstitutional as applied”); *Parbel*, 378 S.C. at 258, 662 S.E.2d at 469 (finding the Double Jeopardy Clause prohibited appellate review where “[t]he magistrate granted Appellant’s motion for

¹ Moreover, those cases assumed the defendant was acquitted and the issue discussed focused on whether the State may appeal from an erroneous legal holding that resulted in the acquittal.

dismissal” based on its finding that “the County has not met the allegations of this zoning ordinance in proving 1303”). Respondent offers no argument as to how the dismissal of his case on procedural grounds can be construed as an acquittal. In the absence of an acquittal, there is no Double Jeopardy threat and the claim that this case is unappealable fails.

II.

Investigator Tolson was not required to equip his vehicle with a camera and therefore Section 56-5-2953 of the South Carolina Code is inapplicable to bar the State's prosecution.

Respondent offers little by way of cogent argument as to why Investigator Tolson's vehicle should be equipped with video equipment, instead reciting case law about what the video should include if the statute was actually implicated. However, he does conclude without discussion that it is enough that Investigator Tolson conducted a traffic stop in this one instance to transform his vehicle into a "law enforcement vehicle used for traffic enforcement." (Resp't's Br.9.) This assertion is illogical and unpersuasive. Nothing about the legislature's use of this term indicates it should be construed as something to be created by happenstance. A law enforcement vehicle is either used for traffic enforcement, or it is not.² Application of the attendant statutes and regulations employing this term would be impracticable if it was construed as a moving target. Investigator Tolson was an investigator for the Sixteenth Circuit Solicitor's Office and did not engage in traffic enforcement as part of his professional duties. Here, he only responded to the 911 call because he was the closest officer to a dangerous driver threatening the roadway. The requirements of the video recording statute are thus inapplicable.

² Respondent confuses the issue by assigning significance to the circuit court's conclusion that Investigator Tolson was engaged in law enforcement. Of course he was. The relevant consideration is whether his vehicle was a law enforcement vehicle *used for traffic enforcement*. Additionally, for clarification, Respondent incorrectly asserts the circuit court's findings in this case are reviewed under a clear error standard. However, the circuit court heard this case sitting in an appellate capacity and was therefore not the fact-finder; this Court is not required to give deference to its decision.

CONCLUSION

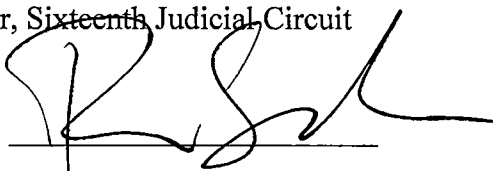
For the foregoing reasons, the State respectfully requests the case be remanded for retrial.

Respectfully submitted,

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September 9, 2016
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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Reply Brief of Appellant*, dated September 9, 2016, on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Heath P. Taylor, Esquire
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I further certified that all parties required by Rule to be served have been served. This 9th day of September, 2016.


Angela Bennett
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September 9, 2016

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Re: The State v. Sean Robert Kelly
Appellate Case No. 2016-000875

Dear Counsel:

I am enclosing two (2) copies of the Initial Brief of Appellant and Designation of Matter in the above-referenced case.

Sincerely,

Rane Saunders
Assistant Attorney General
S.C. Bar No. 100073

RS/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services