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SEP 15 2016

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2016-001673

THE STATE,

Respondent,

vs.

GLYNNDEAVIN VON FOX,

Petitioner.

**MOTION TO DISMISS
PETITION FOR WRIT OF CERTIORARI**

Respondent (“the State”), through its undersigned counsel, would respectfully show unto the Court as follows:

I.

In April of 2013, the Charleston County Grand Jury indicted Petitioner Glynndeavin von Fox for one count of assault on police while resisting arrest and one count of throwing of bodily fluids by prisoner. Thereafter, on April 28, 2016, the Honorable Deadra L. Jefferson, circuit court judge, issued a pre-trial order directing Fox to be examined in order for an opinion to be rendered in regard to his competency to stand trial. Subsequently, following the issuance of that order, Fox initiated a pro se appeal of Judge Jefferson’s pre-trial order regarding the competency hearing through the filing of a notice of appeal dated September 15, 2000, and, at the direction of

the Court of Appeals, Fox later filed a proof of service indicating the notice of appeal was served upon the State on May 5, 2016.

II.

On appeal, Fox filed several documents in which he argued Judge Jefferson improperly ordered a competency evaluation to be conducted. Thereafter, the Court of Appeals dismissed Fox's appeal as an improper interlocutory appeal in an order issued on June 17, 2016. Subsequently, Fox petitioned for his appeal to be reinstated, and that petition was denied by the Court of Appeals on July 28, 2016.

III.

In South Carolina, the right to appeal is conferred by and controlled by S.C. Code Ann. § 14-3-330. State v. Miller, 289 S.C. 426, 426, 346 S.E.2d 705, 705 (1986); see Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (“The right of appeal arises from and is controlled by statutory law.”). Ordinarily, an appeal may only be pursued after a party has obtained a final judgment or has otherwise satisfied the terms of Section 14-3-330. State v. Wilson, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010); see Miller, 289 S.C. at 426, 346 S.E.2d at 705 (“In order to exercise his statutory right to appeal, a defendant must come within the terms of the applicable statute.”). In criminal cases, judgment for a criminal defendant is not final until a sentence is imposed. State v. Robinson, 287 S.C. 173, 174, 337 S.E.2d 204, 204 (1985); see Berman v. United States, 302 U.S. 211, 212 (1937) (“Final judgment in a criminal case means sentence. The sentence is the judgment.”). Thus, a criminal defendant may **not** appeal until **after** a sentence has been imposed. Parsons v. State, 289 S.C. 542, 542, 347 S.E.2d 504, 504 (1986); see State v. Timmons, 68 S.C. 258, 259, 47 S.E. 140, 141 (1904) (“[A] defendant in a criminal case cannot appeal except from the final sentence imposed by the Court.”).

IV.

In the case sub judice, Fox filed an appeal with the Court of Appeals from Judge Jefferson's pre-trial order directing a competency to stand trial evaluation to be conducted. Importantly, just as the Court of Appeals determined in dismissing Fox's appeal, such an order cannot be immediately appealed in light of the fact no final judgment had been obtained in Fox's criminal matter. See Hagood, 362 S.C. at 194, 607 S.E.2d at 708 ("An appeal ordinarily may be pursued only after a party has obtained a final judgment."). As a result, Fox could not yet pursue an appeal in his case, and the Court of Appeals never properly had appellate jurisdiction over Fox's appeal. See Tatnall v. Gardner, 350 S.C. 135, 137-138, 564 S.E.2d 377, 378-379 (Ct. App. 2002) (instructing the appellate court did not have proper jurisdiction over an appeal that was interlocutory); see also Miller, 289 S.C. at 426, 346 S.E.2d at 705 ("In order to exercise his statutory right to appeal, a defendant must come within the terms of the applicable statute."). Accordingly, the decision of the Court of Appeals dismissing Fox's appeal as an improper interlocutory appeal was unquestionably correct. See State v. Dingle, 279 S.C. 278, 282, 306 S.E.2d 223, 225 (1983) ("We hold that the order [committing Dingle so his fitness to stand trial could be evaluated] is interlocutory in nature and thus not appealable. Since the order is not appealable until final judgment is rendered, the trial court had continuing jurisdiction over the subject matter of the case."), abrogated on other grounds by Horton v. California, 496 U.S. 128 (1990); see also State v. Hubbard, 277 S.C. 568, 569, 290 S.E.2d 817, 817 (1982) ("No final judgment has occurred in this case and the order appealed from is interlocutory. Therefore, we dismiss the appeal and remand the case for trial." (citation omitted)); cf. State v. Isaac, 405 S.C. 177, 187, 747 S.E.2d 677, 682 (2013) ("[B]ecause the denial of a defendant's request for immunity under the [South Carolina Protection of Persons and Property] Act is an interlocutory

order not subject to immediate appeal, this appeal is dismissed and the matter is remanded for trial.”).

V.

In petitioning this Court for further appellate review of his appeal, Fox does not appear to be challenging the Court of Appeals’ ruling his appeal was interlocutory and does not appear to be making any arguments directly addressing the basis upon which the Court of Appeals dismissed his appeal. Instead, Fox is seeking review from this Court on the grounds the Court of Appeals should have allegedly held his case was barred by the doctrine of res judicata for several different reasons. Importantly though, in light of the fact Fox has not disputed the correctness of the Court of Appeals’ conclusion his appeal was an improper interlocutory appeal, any argument in that regard has been abandoned. See Jones v. Leagan, 384 S.C. 1, 17, 681 S.E.2d 6, 15 (Ct. App. 2009) (“An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal.”); Gold Kist, Inc. v. Citizens & S. Nat’l Bank of South Carolina, 286 S.C. 272, 276, 333 S.E.2d 67, 70 (Ct. App. 1985) (instructing issues not raised in an appellate brief are deemed to be abandoned); see generally JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 77 (2nd ed. 2002) (“There are two prerequisites to preserving an issue for consideration by the Supreme Court on a writ of certiorari: (1) the issue must have been raised in the initial arguments to the Court of Appeals, and (2) the issue must have been raised in the petition for rehearing before the Court of Appeals.”). Therefore, because the appeal is an improper interlocutory appeal and no contention has been raised to the contrary, there is no appellate jurisdiction over the matter. See North Carolina Fed. Sav. & Loan Ass’n v. Twin States Dev. Corp., 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986) (“The right of appeal arises from and is controlled by statutory law. The jurisdiction of appellate courts is prescribed by S.C.

Code Ann. § 14-3-330.”); Tatnall, 350 S.C. at 137-138, 564 S.E.2d at 378-379 (recognizing the appellate court did not have jurisdiction because the appeal was an improper interlocutory appeal); see also Miller, 289 S.C. at 426, 346 S.E.2d at 705 (instructing that a criminal defendant is only entitled to appeal if he meets the statutory requirements for an appeal). Accordingly, Fox’s petition for a writ of certiorari should be dismissed as an improper interlocutory filing.

WHEREFORE, Respondent prays that this Court will dismiss Fox’s Petition for a Writ of Certiorari due to the lack of appellate jurisdiction; permit the matter to continue proceeding forward in the circuit court where jurisdiction over Fox’s case is currently vested; hold any appellate filing timelines in abeyance pending a ruling on Respondent’s motion; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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By: 

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September 15, 2016

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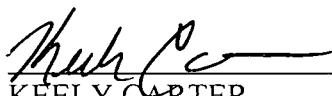
Petitioner.

PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Motion to Dismiss Petition for Writ of Certiorari on Petitioner by sending two copies of the same to:

Glynndeavin von Fox
164 Market Street, Suite 117
Charleston, SC 29401

I further certify that all parties required by Rule to be served have been served.
This 15th day of September, 2016.



KEELY CARTER
Legal Assistant

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