

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Appeal Case No. 2015-002345

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MAR 14 2017

S.C. SUPREME COURT

Christopher A. Wellborn, Petitioner,

v.

The City of Rock Hill, Respondent.

AMENDED BRIEF OF PETITIONER

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STATEMENT OF THE ISSUES ON APPEAL

- I. **DID THE COURT ERR IN FINDING THE PETITIONER IN CRIMINAL CONTEMPT WHEN THERE WAS NO RECORD OF THE PROCEEDINGS?**
- II. **DID THE TRIAL COURT JUDGE ERR IN FAILING TO RECUSE HIMSELF FROM HEARING THIS CASE?**
- III. **DID THE ALLEGED CONDUCT OF THE PETITIONER COME WITHIN THE PREVIEW OF THE SOUTH CAROLINA CODE SECTIONS 22-3-950 or 40-5-510.**

STATEMENT OF THE CASE

On March 6, 2013, Peter J. Lenzi, Associate Judge for the Rock Hill Municipal Court, filed a Verified Petition alleging five counts of contempt of court against the Petitioner. The Petitioner filed a Motion for Recusal on March 20, 2013. The matter was heard on March 25, 2013. Judge Lenzi issued a written Order on March 28, 2013, in which the Petitioner was held in contempt of court on two of the five allegations alleged in the Petition. The Petitioner timely filed a Notice of Appeal to the Court of Common Pleas of York County, South Carolina. The appeal was heard on August 3, 2013, by the Honorable John C. Hayes, III. Judge Hayes issued a written Order dated September 25, 2013 and filed October 2, 2013. In Judge Hayes' Order the Court reversed one of the findings of contempt against Petitioner and upheld the other finding of contempt. The Petitioner timely filed a Motion to Reconsider. The Court issued an Order denying the Motion to Reconsider dated November 6, 2013 and filed on November 13, 2013. On November 29, 2013, the Petitioner filed a Notice of Appeal to the South Carolina Court of Appeals. The South Carolina Court of Appeals issued a per curiam opinion affirming the Circuit Court on August 12, 2015. The Petitioner filed a Petition for Rehearing on August 26, 2015, which was denied on October 23, 2015. Thereafter, the Petitioner filed a Petition for Writ of Certiorari which was granted by the South Carolina Supreme Court on January 17, 2017.

FACTS

The Petitioner is an attorney licensed in the State of South Carolina. On January 16, 2013, the Petitioner represented David H. Cullen on a charge of reckless driving in a jury trial in the Rock Hill Municipal Court. Prior to the Court date the Petitioner had contacted the Solicitor who was handling the case and asked if there would be a trial that day. The Petitioner was assured by the Solicitor that if there was going to be a trial the Solicitor would let him know by the preceding evening. The Petitioner heard nothing else about the case being tried and on the morning of trial date took his car to have repairs done. While the Petitioner was having his car repaired he received a call from the Solicitor stating they were striking a jury.¹ The Petitioner contacted his client and arrived at Court later that morning.² At the beginning of the trial the Petitioner and his client were not in Court. According to the Petition filed by Judge Lenzi, the Petitioner asked for permission to advise the jury during his opening statement as to why neither he nor his client were present for jury selection. According to the Petition, the Court denied that request and instructed the Petitioner not to make any comment concerning him or his client's tardiness in appearing for Court in any manner in the jury's presences.³ The Petitioner testified that Judge Lenzi ruled that neither party were to go into any detail or explanation as to why the Petitioner or his client were late or not present during the time of jury selection.⁴ The Petition alleges that, "as he was leaving the courtroom, Mr. Wellborn in the jury's presence, once again stated he wanted to explain to the jury why he and his client were late in arriving to Court".⁵ The Petitioner testified that he asked, after opening statements, if he would be allowed to go out into the hall to see if his client had arrived. The Petitioner testified as follows, "I made no further

¹ App. p. 87, line 14 – p. 88, line 25.

² App. p. 90, line 21 – p. 91, line 7.

³ App. p. 48, Verified Petition alleging contempt of Court, p. 2

⁴ App. p. 96, lines 9-16.

⁵ App. p. 48, Verified Petition alleging contempt, page 2.

comment regarding my lateness to Court or where I was or anything else, during the entire course of the trial, either in the jury's presence or out of the jury's presence, in the Courtroom or in the hallway, or anywhere else".⁶ Judge Lenzi found the Petitioner in criminal contempt of court for requesting in the presence of the jury permission to explain to the jury why he and his client was late for Court and fined the Petitioner \$500.00.⁷

ARGUMENT

I. THE COURT ERR IN FINDING THE PETITIONER IN CRIMINAL CONTEMPT WHEN THERE WAS NO RECORD OF THE PROCEEDINGS.

Before a person may be held in criminal contempt the record must be clear and specific as to the acts or conduct upon which such finding is based. State v. Harper, 297 S.C. 257, 376 S.E. 2d 272 (1989). Contemptuous conduct must be clearly and specifically reflected in the record. State v. King, 306 SC 335, 412 S.E. 2d 375 (S.C. 1991); Brasington v. Shannon, 288 S.C. 183, 341 S.E. 2d 130 (S.C. 1986). There was no record made of the proceedings in which the Petitioner was representing his client therefore no records of those proceedings exist.⁸ The lack of record was prejudicial to the Petitioner in this case. These allegations of criminal contempt involved a factual dispute between the trial judge and Petitioner as to what actually occurred. According to the Petition filed by Judge Lenzi, he instructed the Petitioner not to make any comment about he or his client's tardiness in appearing for Court in any manner in the jury's presence. Judge Lenzi alleged in his Petition that the Petitioner made a request in the jury's presence to explain to the jury why he and his client were late in arriving to Court. The Petitioner denied the allegations made in the Petition.⁹ No witnesses testified as to the

⁶ App. p. 97, lines 12-23.

⁷ App. p. 52, In the Order in Contempt of Court, page 2.

⁸ App. p. 118, lines 10-17.

⁹ App. p. 97, lines 12-23.

Petitioner's alleged contemptuous conduct. The allegations against the Petitioner were made pursuant to a Petition filed by Judge Lenzi.¹⁰

In these circumstances the lack of a record prevented the Petitioner from presenting a defense. The Petitioner denies the conduct in question. There was no witnesses testifying as to the conduct. The only allegations were contained in the Petition filed by Judge Lenzi. The Petitioner's only way to prove that he did not commit the conduct would be the content of a record of the proceedings. Since this was an action for criminal contempt, the Petitioner had a right under Article 1, Section 14 of the South Carolina Constitution to be fully heard in his defense. The lack of a record denies the Petitioner's right to confront the allegations against him. In Washington v. Texas, 388 U.S. 14 (1967), the U.S. Supreme Court ruled that a defendant has a fundamental due process right to offer relevant witness testimony. The South Carolina Court of Appeals cited Washington in State v. Page, 406 S.C. 272, 750 S.E. 2d 623 (2013). In Page the Court described the right to present a defense as the right to present the defendant's version of the facts. While Petitioner had the right to present witnesses, the lack of a record prevented him from obtaining and presenting evidence that could prove his innocence. Here the Petitioner had no way to present defense because his defense would have been to point to the record that would show he did not commit the conduct.

To uphold the finding of contempt against the Petitioner would be to rule that without any record or any opportunity by the Petitioner to challenge the allegation, one can be held in contempt of court by the allegations of the Judge without any testimony or other supporting evidence.

¹⁰ App. p. 18, line 19

II. THE TRIAL COURT JUDGE ERRED IN FAILING TO RECUSE HIMSELF FROM HEARING THIS CASE.

Cannon 3.E (1)(d)(IV) of the Code of Judicial Conduct, Rule 501 SCACR provides that a judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned and that the trial judge impartiality may be questioned because, (2) “to the judge’s knowledge that he or she is likely to be a material witness in the proceedings.”

At the beginning of the contempt proceeding the Petitioner’s counsel moved that the judge recuse himself.¹¹ The motion for recusal was denied.

In the present case, the factual allegations which allegedly constituted the contempt were made by Judge Lenzi by way of a Verified Petition. The Petitioner denied the factual allegations of the Petition. It is obviously impossible for the Judge to be impartial in making a determination of the actual allegations, in ruling between his version of what occurred and the Petitioner’s version of what occurred. While the Court has inherit power to punish for contempt committed in the Court’s presence, in most cases there is a record of the proceeding. Since there was no record of the proceedings there had to be a factual determination made as to what actually occurred. In the present case the actual determination was made by the person making the allegations.

No witnesses testified against the Petitioner in the contempt proceedings. The Petitioner was found in contempt based upon the observations of the Judge, who also conducted the contempt proceedings. The trial judge cannot be an impartial Judge of the contempt proceedings because there was a factual dispute about what occurred between the Petitioner and the trial judge. The trial judge could not have been expected to rule against himself in a factual dispute.

¹¹ App. p. 74, lines 15 – p. 75, line 6.

III. THE ALLEGED CONDUCT OF THE PETITIONER DID NOT COME WITHIN THE PREVIEW OF THE SOUTH CAROLINA CODE SECTIONS 22-3-950 OR 40-5-510.

There was not a finding in the Order of the Municipal Court that the Petitioner violated §22-3-950 or §40-5-510. The Court of Common Pleas held that the Petitioner's conduct constituted an open and direct contempt to the Court in violation of §40-5-510 South Carolina Code of Laws. The Court of Common Pleas did not address whether the Petitioner's conduct violated South Carolina Code of Laws Section 22-3-950.

Section 22-3-950 provides that a magistrate may punish for contempt a person who, "shall offer an insult to the magistrate or a juror or is willfully guilty of an undue disturbance of the proceedings before the magistrate while sitting officially". There is no evidence of the proceedings that the Petitioner by requesting permission to inform the jury why he and his client were late was offering an insult to the Judge or caused an undue disturbance in the proceedings. Therefore §22-3-950 does not apply to Petitioner's alleged conduct.

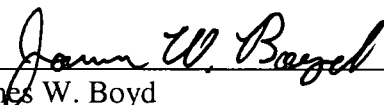
Although the trial Court did not make a finding as to violation of §40-5-510, the Court of Common Pleas found that Petitioner's alleged conduct constitutes, "an open and direct contempt of Court", in violation of §40-5-510 South Carolina Code of Laws. Section 40-5-510 provides for consequences for attorney's if, "in the presence of such Court, they are guilty of any disorderly conduct causing an interruption of business or amounting to an opening and direct contempt to the Court, its authority or person." This section requires two elements. The first is that there must be disorderly conduct on the part of the attorney. The second is that the disorderly conduct must cause a disruption of business or amount to an open or direct contempt of the Court its authority or person. While disobedience to a Court order may amount to an open and direct contempt to the Court it does not necessarily constitutes disorderly conduct. In this

case there is no evidence that the Petitioner engaged in disorderly conduct. The Petitioner is to have alleged to have made a request to the Court in the presence of the jury in violation of a Court order. There was no evidence or testimony that the alleged request caused a disruption or that the Petitioner acted in a disorderly manner in making the request. Therefore, §40-5-510 does not apply to this case.

CONCLUSION

For all the foregoing reasons the Petitioner request that this case be reversed.

Respectfully Submitted,


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March 7, 2017

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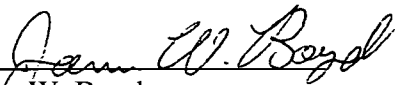
Christopher A. Wellborn, Petitioner,

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PROOF OF SERVICE

I, James W. Boyd, certify that I served the within Amended Brief of
Petitioner on Respondent by depositing a copies of the same in the United States
mail, postage prepaid, addressed to its attorney of record, Christ Barton and Paula
Knox Brown, Assistant Solicitor, 201 E. Main Street, 3rd Floor, Rock Hill, SC
29730, I further certify that all parties required by Rule 208 to be served have
been served.


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March 9, 2017