STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY

John C. Hayes, III, Circuit Judge

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S.C. SUPREME COURT

Unpublished Opinion No. 2017-UP-391 (S.C. Ct. App. filed Oct. 18, 2017)

The State...Respondent,

v.

Sean Robert Kelly... Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 11, 2017 (App. p. 6).

QUESTION PRESENTED

1. Did the Court of Appeals err in failing to hold that the decisions of the lower courts were not appealable to the Court of Appeals based upon Double Jeopardy?

STATEMENT OF THE CASE

Petitioner was arrested for Driving Under the Influence, First Offense, in York County by a York County Deputy Sheriff on September 11, 2013. On September 17, 2015, the case was called for a bench trial before the Honorable Clayburn Barnette, Jr. in the York County Magistrate's Court. The State's witnesses were sworn and the magistrate heard and received evidence from the State (App. p. 58). Following the presentation of the State's case, counsel for Petitioner moved for a directed verdict. The magistrate took the matter under advisement and recessed until November 25, 2015. When the parties reconvened, Judge Barnette granted Petitioner's motion and entered a judgment of acquittal (App. p. 11 - 13).

Respondent filed an appeal in the York County Court of Common Pleas on or about December 1, 2015 (App. pp. 14 - 19). The parties appeared before the Honorable John C. Hayes, III on March 23, 2016 in order to address the State's appeal. By Order filed March 29, 2016, Judge Hayes affirmed the magistrate's decision (App. pp. 44 – 47). On or about March 31, 2016, the State filed a Motion to Reconsider pursuant to Rule 59(e), SCRCP (App. pp. 48 - 53). By Order filed April 13, 2016, the State's Motion to Reconsider was denied (App. p. 54).

Respondent filed a timely appeal to the Court of Appeals (App. p. 55) The Court of Appeals reversed the decision of the lower courts in *State v. Sean Robert Kelly,* Unpublished Opinion No. 2017-UP-391 (S.C. Ct. App. filed October 18, 2017) (App. pp. 1 – 2). Petitioner filed a timely Petition for Rehearing on October 30, 2017 (App. pp. 3 – 5). The Petition for Rehearing was denied by Order filed December 11, 2017 (App. p. 6). Petitioner seeks a writ of certiorari to review the decision of the Court of Appeals.

ARGUMENT

1. THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE DECISIONS OF THE LOWER COURTS WERE NOT APPEALABLE TO THE COURT OF APPEALS BASED ON DOUBLE JEOPARDY.

The Court of Appeals failed to address or acknowledge Petitioner's first argument concerning the State's ability to appeal the decisions of the lower courts. There is no dispute that Respondent's case was called for a bench trial, witnesses were sworn and a judgment of acquittal was rendered. It is well settled that the State has no right of appeal from a directed verdict of not guilty.[1] *State v. McWaters*, 246 S.C. 534, 144 S.E.2d 718 (1965); *State v. Ludlam*, 189 S.C. 69, 200 S.E. 361 (1938); *State v. Ivey*, 73, S.C. 282, 53 S.E. 428 (1906); *State v. Gathers*, 15 S.C. 370 (1881). "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 2147 (1978). "This state of jeopardy attaches when a jury is empanelled and sworn, or, in a bench trial, when the judge begins to receive evidence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S.Ct. 1349, 1353 (1977).

[1] Based upon *I'On v. Town of Mount Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), this Court may consider issues not ruled upon by the lower court as additional sustaining grounds as long as the reason appears in the record below.

"That the State has no right of appeal from judgment upon verdict of acquittal in a criminal case seems to have been recognized and accepted as the law of this jurisdiction from the beginning of our judicial history." *State v. Lynn*, 120 S.C. 258, 260, 113 S.E. 74, 75 (1922). The State has a limited right of appeal in criminal cases and generally has no right of appeal from an acquittal except in circumstances where the acquittal was procured by the accused's fraud or collusion. This principle applies even in cases where there has been legal error. *State v. Holliday*, 255 S.C. 142, 144-45, 177 S.E.2d 541, 542-543 (1970).

In *Horry County v. Parbel*, 378 S.C. 253, 662 S.E.2d 466 (Ct. App. 2008), our Court of Appeals addressed the issue of a double jeopardy violation following the dismissal of the defendants' charges. In *Parbel*, several female dancers and the manager of an adult entertainment establishment were cited for alleged criminal violations of Horry County zoning ordinances. All individuals charged requested a jury trial and a criminal trial was held before an Horry County magistrate. After Horry County rested its case, counsel for the defendants moved for a dismissal of all charges. The magistrate granted the motion to dismiss.

Horry County appealed the magistrate's ruling to the circuit court. The circuit court held that the magistrate's interpretation of the zoning ordinance was incorrect but also held that double jeopardy prevented the defendants from being tried a second time. Based upon double jeopardy principles, this Court held that the circuit court did not have the authority to review possible legal errors following an acquittal.

In addition to the decisions cited above, the *Parbel* court based its holding on our this Court's decision in *State v. Tillinghast*, 375 S.C.201, 652 S.E.2d 400 (2007). In *Tillinghast*, the defendant was charged with possession of alcohol by a minor. Following the State's case, the magistrate found that the statute under which the defendant was charged to be unconstitutional and

directed a verdict of acquittal. The State appealed the magistrate's decision to the circuit court but indicated that it was not seeking to reinstate the charge against the defendant.

The circuit court held that it had jurisdiction to hear the appeal and that the magistrate erred in finding the statute unconstitutional. This Court reversed stating:

> The *Holliday* court noted that "no writ of error, appeal, or other proceeding lies on behalf of the state to review or to set aside a verdict or a judgment of acquittal in a criminal case, although there may have been error committed by the court, or a perverse finding by the jury."

Id., 375 S.C. at 203, 652 S.E.2d at 401. The court further noted that the denial of the right of the State to appeal is ". . . premised upon the basic double jeopardy principle that a defendant in a criminal prosecution is in legal jeopardy when he has been placed on trial. . . ." *Id.*

The facts in *Parbel* and *Tillinghast* are similar to the present case. The case was called for a bench trial. The State's first witness, Investigator Kevin Tolson, was sworn and jeopardy attached (App. p. 58 at 4:36). Investigator Toslon testified with regard to his initial stop of Respondent and the fact that his car had no video recording equipment. The State then called Deputy Stagner of the York County Sheriff's Department who testified at length with regard to the arrest of Respondent. The State rested its case. Counsel for Respondent moved for a directed verdict (App. p. 11). The motion was taken under advisement and after a lengthy recess, the magistrate dismissed the case based upon the State's failure to produce a video in compliance with S.C. Code Ann. § 56-5-2953 (Supp. 2013).

As noted above, jeopardy attaches in a bench trial when the court begins to receive evidence. *Martin Linen Supply Co.*, 430 U.S. at 569, 97 S.Ct. at 1353. In the present case, witnesses were sworn and the State presented its entire case-in-chief. Jeopardy unquestionably

attached. Assuming *arguendo* that the State is correct that the magistrate erred as a matter of law in dismissing the case, the State's appeal should have been dismissed. Although 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, Petitioner cannot be subjected to another trial for this offense. As the *Tillinghast* court noted: **"Whether or not the magistrate erred in his ruling of law, appellant was acquitted and is now out of court."** *Tillinghast*, 375 S.C. at 203, 652 S.E.2d at 401 (emphasis added). Consequently, the Court of Appeals should have dismissed the present appeal.

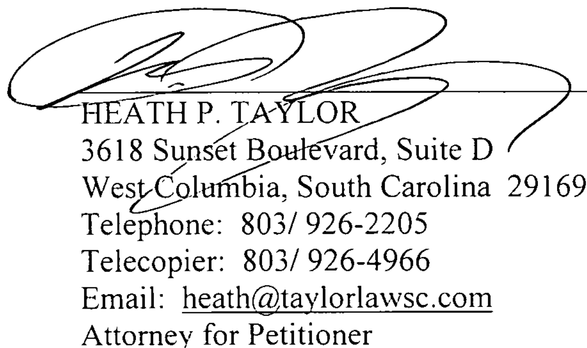
CONCLUSION

The decision of the Court of Appeals ignores well settled South Carolina jurisprudence. This Court should grant a writ of certiorari in order to review this important procedural and constitutional question.

Respectfully Submitted,

TAYLOR LAW FIRM LLC

January 9, 2018



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PROOF OF SERVICE

I certify that I have served the Petition for a Writ of Certiorari by causing it to be mailed to its attorneys of record, Alan M. Wilson, Esquire and Ranee Saunders, Esquire, at their office, P.O. Box 11549 Columbia, SC 29211-1549 and Kevin S. Brackett, Esquire, 16th Circuit Solicitor's Office, 1675-IA York Highway, York, South Carolina 29745 on January 9, 2018.

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