STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From York County
Hon. John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2018-000029

The State, Respondent,

v.

Sean Robert Kelly, Petitioner.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Procedural History

On September 11, 2013, Petitioner was arrested for driving under the influence (DUI) pursuant to Section 56-5-2930 of the South Carolina Code. A bench trial was held in magistrate's court before the Honorable Clayborn Barnette, Jr., on September 12, 2015. After the State rested, Petitioner moved for a "directed verdict" on the basis of the State's failure to properly present a video recording under section 56-5-2953(A) of the South Carolina Code[1]. Several days later, the magistrate granted the motion to dismiss the case. The State filed a notice of appeal in circuit court on December 1, 2015.

The Honorable John C. Hayes, III, heard the appeal from the magistrate's decision. Petitioner never raised the issue of Double Jeopardy to the circuit court. By Order dated March 25, 2016, Judge Hayes affirmed the decision of the magistrate, and the court did not address the issue of Double Jeopardy in its Order.

The State served and filed a timely Notice of Appeal on April 22, 2016. Petitioner raised the issue of Double Jeopardy for the first time in his Brief to the Court of Appeals. The Court of Appeals considered the appeal and reversed the decisions of the magistrate and circuit court and remanded for trial. The Court of Appeals did not address the issue of Double Jeopardy. Petitioner filed a Petition for Rehearing raising the issue of Double Jeopardy, which was denied on December 11, 2017.

Petitioner timely served his Petition for Writ of Certiorari on January 10, 2018. This Return follows.

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[1] Petitioner raised several issues, which are memorialized on the audio approximately between 1:19:45 and 1:34:00, all of which relate to the failure to present a proper video recording.

ARGUMENT

I. The Court of Appeals did not err in considering the State's appeal and ultimately reversing and remanding for retrial because retrial is not barred by the Double Jeopardy Clause.[2]

The Court of Appeals correctly refused to consider the issue of Double Jeopardy because it had been waived by Petitioner by failing to raise the issue to the circuit court sitting as an appellate court. Further, even if considered on the merits, the Double Jeopardy Clause does not bar retrial of this case because the dismissal was a procedural dismissal and not the equivalent of an acquittal.

Petitioner 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 Petitioner 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 a consideration entirely within the discretion of the appellate court. It is clear this discretion should not promote the erosion of well-settled tenets of preservation. Instead, this Court explained it "likely would perceive it as being unfair or unwise to resolve a case on a ground

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[2] It is important to note Petitioner has not raised any challenge to the substantive findings of the Court of Appeals' Opinion that the magistrate court erred in dismissing the case. He has not challenged the findings that the State complied with section 56-5-2953 of the South Carolina Code by having the arresting officer produce a video in full compliance with subsection A. Therefore, these findings are the law of the case. See Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."); State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case).

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. This Court's warning was clear: "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." Id. Accordingly, the Court should decline to address this issue because it is not preserved and specifically waived by Petitioner. See State v. Langford, 400 S.C. 421, 446, 735 S.E.2d 471, 484 (2012) ("Constitutional issues are not exempt from issue preservation requirements.").

Regardless of preservation, Petitioner'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 Petitioner fails in his argument is in his misguided assumption he was acquitted by the magistrate court. The United States Supreme Court has clarified 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) (emphasis added).

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." (App p.11.) He thus concluded that based on that deficiency, "the court must dismiss this prosecution." (App. p.11.) Petitioner acknowledges: "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)" and not based on either an acquittal by the magistrate or a determination by the magistrate the facts presented were insufficient to support a finding of guilt. (Pet. Cert. p.4). Petitioner 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." (Pet. Cert. p.5.) 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 Petition, as both address situations expressly involving an acquittal, not dismissals on purely procedural grounds. 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 dismissal" based on its finding that "the County has not met the allegations of this zoning ordinance in proving 1303"). Petitioner 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. Accordingly, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 6, 2018

STATE OF SOUTH CAROLINA

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S.C. SUPREME COURT

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The State, Respondent,

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PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Heath P. Taylor, Esquire
3618 Sunset Blvd., Suite D
West Columbia, South Carolina 29169

I further certify that all parties required by Rule to be served have been served.
This 6th day of February, 2018.

ANNE A. MUELLER
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727