

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Letitia H. Verdin, Circuit Court Judge

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DEC 06 2018
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

Respondent

v.

MIGUEL A. CANO

Petitioner

Appellate Case No. 2018-002077

RETURN TO PETITION FOR WRIT OF SUPERSEDEAS

Respondent, in making its return, submits the writ of supersedeas must be denied or, in the alternative, held in abeyance. In support, respondent would respectfully show the Court:

I. Background

Petitioner was charged with murder under a juvenile warrant for the stabbing death of his mother.¹ (2015-JU-23-824). Following a hearing in Family Court, Judge Alex Kinlaw, Jr.,

¹ Respondent notes it does not agree with petitioner's stated version of facts in the writ of supersedeas, but has not included a counter statement of facts as no record of the circuit court proceedings has yet been introduced on appeal. *See generally* Rule 210, SCACR (providing what matter shall be included in the record on appeal); *S.C. State Highway Dep't v. Meredith*, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) ("[C]ounsel is prohibited from embodying in their briefs any fact which does not appear in the record."); *Morris v. Tidewater Land & Timber, Inc.*, 388 S.C. 317, 333, n. 16, 696 S.E.2d 599, 608 (Ct. App. 2010) ("Under our appellate court rules, we may not consider any fact that does not appear in the record."). The facts of the crime and character or characteristics of the defendant are not relevant to the legal analysis of the whether the appeal may be heard or the writ of supersedeas granted.

transferred jurisdiction of petitioner to the Court of General Sessions by order dated January 28, 2017. Petitioner made several post-hearing motions which Judge Kinlaw denied March 6, 2017. On March 14, 2017, in General Sessions, petitioner filed a motion for review and remand to Family Court. Judge Letitia H. Verdin denied the motion by order dated May 23, 2017, and on June 21, 2017, denied a later motion for reconsideration. During this time, a Greenville County grand jury indicted petitioner for murder. (2017-GS-23-03939A). On August 7, 2018, petitioner filed a separate motion to transfer to Family Court. Judge Verdin allowed petitioner to proffer testimony in support of his motions during a hearing on August 24, 2018. By order dated November 5, 2018, Judge Verdin found no legal basis to support the request to review the decision of the Family Court and again denied the motions to review and remand, and transfer to Family Court.

In initiating this action, petitioner seeks a writ of supersedeas, arguing it is necessary to stay his trial pending an appeal. For the reasons set forth below, respondent submits the writ must be denied or, in the alternative, held in abeyance.

II. Writ Can be Held in Abeyance

The Court can hold the writ of supersedeas in abeyance. Petitioner seeks the writ to prevent his trial from proceeding in the lower court and to allow his appeal to move forward. Petitioner appealed a circuit court order denying his motion to review and remand a contested waiver of jurisdiction from Family Court. Respondent on this same day filed a motion to dismiss the notice of appeal on the basis the appeal is not subject to an interlocutory appeal. *See State v. Lockhart*, 275 S.C. 160, 161, 267 S.E.2d 720, 720 (1980) ("[A] family court order transferring jurisdiction over a defendant to a court of general sessions is interlocutory and not subject to immediate appeal.").

Should this Court grant respondent's motion to dismiss the appeal, the writ becomes moot because petitioner's only reason for filing it is to obtain a decision in his appeal, as he argued in his petition. Therefore, the writ can be held in abeyance pending a decision on respondent's motion to dismiss.

III. Writ of Supersedeas Not Properly Before the Court

In the alternative, the Court can find the writ of supersedeas is not properly before it. Generally, the Court of Appeals "has the same authority to issue writs of supersedeas, grant stays, and grant petitions for bail as the Supreme Court would have in a similar case." S.C. Code Ann. § 14-8-200(a). However, in this case, because the appeal is interlocutory, the Court cannot consider the writ. Petitioner filed the writ for the sole purpose of obtaining a decision in his appeal, as argued throughout his petition. The writ is not properly before the Court and its merits cannot be considered because petitioner cannot demonstrate the underlying reason is credible—i.e. that the appeal is not interlocutory. *See Lockhart*, 275 S.C. at 161, 267 S.E.2d at 720 ("[A] family court order transferring jurisdiction over a defendant to a court of general sessions is interlocutory and not subject to immediate appeal."); *see also State v. Rearick*, 417 S.C. 391, 398-399, 790 S.E.2d 192, 196 (2016) ("To appeal, a defendant must be 'aggrieved' by a decision that is statutorily classified as one that is appealable, which generally involves a final judgment."); *State v. Miller*, 289 S.C. 426, 427, 346 S.E.2d 705, 706 (1986) (holding to seek an appeal, a criminal defendant must come within the terms of the statute). Therefore, the writ of supersedeas must be denied.

IV. Conclusion

WHEREFORE, respondent submits the writ of supersedeas can be held in abeyance or, in the alternative, denied because it is not properly before the Court.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General

BY: 

SHERRIE BUTTERBAUGH
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ATTORNEYS FOR RESPONDENT

December 6, 2018.

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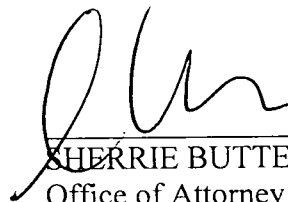
Appellate Case No. 2018-002077

PROOF OF SERVICE

I, Sherrie Butterbaugh, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Supersedeas on Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record, Christopher D. Scalzo, Esq. and Michael G. Martinez, Esq., Greenville County Courthouse, 305 E. North Street, Suite 123, Greenville, South Carolina 29601, and to Robert Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 6th day of December, 2018.



SHERRIE BUTTERBAUGH
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Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

December 6, 2018

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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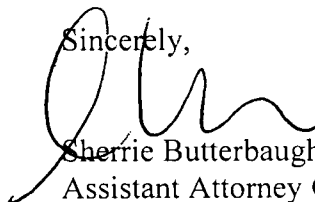
Re: *The State v. Miguel A. Cano*
Appeal from Greenville County
Appellate Case No. 2018-002077

Dear Ms. Kitchings:

Enclosed for filing are the original and six (6) copies of the Respondent's Return to Petition for Writ of Supersedeas, and a Motion to Dismiss Notice of Appeal as Interlocutory, together with Proofs of Service, in the above-referenced matter.

Thank you for your assistance in this matter.

Sincerely,


Sherrie Butterbaugh
Assistant Attorney General

SB/dmd

Enclosures

cc: Christopher D. Scalzo, Esq. (w/two copies of encls.)
Michael G. Martinez, Esq. (w/two copies of encls.)
Robert M. Dudek, Esq. (w/two copies of encls.)
The Honorable W. Walter Wilkins, Solicitor, 13th Judicial Circuit (w/copies of encls.)
Trisha Allen, Victim Advocacy Division (w/copies of encls.)