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STATEMENT OF THE CASE

On October 18, 2011 the presiding judge of the North Charleston Municipal Court, Blair Jennings, convicted Johnathan Daniels ("Appellant") of violating SC Code Section 56-5-3470 (No Light on Bike) and fined him $100.00. (R. pp. 2, 16). Appellant appealed his conviction to the Court of Common Pleas in Charleston County. On May 23, 2012, Common Pleas Judge Markely Dennis denied Appellant's appeal. (R. p. 3). Subsequently, Appellant sought review by the South Carolina Court of Appeals.

FACTS

On September 28, 2011 Officer Desheers ("Desheers") issued a citation to Appellant for a violation of SC Code Section 56-5-3470. (R. p. 16).

Appellant's trial was conducted at the North Charleston Municipal Court's 1:00 session on October 18, 2011. (R. p. 16). Appellant was advised of his right to a jury trial and ability to be represented by counsel. (R. p. 16). Though Judge Jennings offered Appellant a continuance to seek counsel and a jury trial, Appellant declined in favor of proceeding at that time pro se. (R. p. 16).

At trial Desheers testified that he witnessed Appellant on September 28, 2011 riding a bicycle at night in the City of North Charleston without a light in violation of SC Code Section 56-5-3470. (R. p. 16). Appellant cross-examined Desheers and also testified on his own behalf.

(R. pp. 7, 16) The presiding judge weighed the evidence, found the officer's testimony to be more credible, and found Appellant guilty of the charged offense. (R. p. 16).

I. THERE WAS NO VIOLATION OF APPELLANT'S RIGHT TO COUNSEL OR HIS RIGHT TO TRIAL BY JURY

In reviewing convictions from magistrate or municipal courts, the "circuit court does not review the matter de novo; rather, the court reviews the case for preserved errors raised by appropriate exception." Town of Mount Pleasant v. Roberts, 393 S.C. 332, 341, 713 S.E.2d 278, 282 (2011). The "appellate court's review in criminal cases is limited to correcting the order of the circuit court for errors of law." State v. Hoyle, 397 S.C. 622, 625, 725 S.E.2d 720 (Ct. App. 2012).

A. No violation of Appellant's Sixth Amendment Right to Counsel Could Possibly Have Occurred Since Appellant Possessed No Right to Counsel.

The Sixth Amendment right to counsel does not even apply in this case since Appellant was not sentenced to imprisonment. Where a sentence of imprisonment is present the Sixth Amendment to the United States Constitution provides that "the accused shall [...] have the Assistance of Counsel for his defense."[1] Conversely, no such right to counsel exists where imprisonment does not result. The United States Supreme Court clearly set forth this dividing line. Criminal proceedings in state courts warranting Sixth Amendment right to counsel protection include "any misdemeanor case 'that actually leads to imprisonment.'" Sheldon v. Alabama, 535 U.S. 654, 661, 122 S.Ct. 1764 (2002) (quoting Argersinger v. Hamlin, 407 U.S. 25, 33, 92 S.Ct. 2006 (1972)). The Court unmistakably established actual imprisonment "as the line defining the constitutional right to appointment of counsel" because "actual imprisonment is

[1] Though embodied in the federal Constitution, this right was made applicable to the States by way of the Fourteenth Amendment. See Gideon v. Wainwright, 372 U.S. 335, 344-45, 83 S.Ct., 792 (1963).

a penalty different in kind from fines or mere threat of imprisonment." Scott v. Illinois, 440 U.S. 367, 373, 99 S.Ct. 1158 (1979).

The Supreme Court of South Carolina clearly embraced the federal "imprisonment" distinction in Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007), when it stated "a fine for an uncounseled misdemeanor conviction is valid, and Respondent did not have a constitutional right to counsel for this conviction."[2] This embrace is in accord with the Defense of Indigents Act. See SC Code Ann 17-3-10 (stating "Any person entitled to counsel under the Constitution of the United States shall so be advised"). Even South Carolina Appellate Court Rule 602(a) includes a distinction between cases in which imprisonment is likely and those in which imprisonment is unlikely after conviction.[3]

Here, Appellant had no Sixth Amendment right to counsel because he was not imprisoned. The Court found Appellant had violated § 56-5-3470 and assessed a one hundred dollar fine against Appellant. (R. p. 16). Under Talley and Arsersinger, no right to counsel attached because the municipal court did not sentence Appellant to a term of imprisonment. Because Appellant was not entitled to his Sixth Amendment right to counsel no legal error could possibly have occurred when Appellant elected to proceed *pro se*.

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[2] Ironically, Appellant's brief cites at least one case that acknowledges that the Sixth Amendment right to counsel attaches only in cases where imprisonment is imposed on a defendant. See (R. p. 11) (citing Faretta v. California, 422 U.S. 806, 807 (1975)).

[3] There can be no suggestion that the charge in this case, "No Light on Bike", was one likely to result in court sentenced imprisonment.

B. Appellant Knowingly Waived His Right to a Jury Trial.[4]

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to trial by jury in appropriate cases.[5] So does the South Carolina Constitution. See S.C. Const. Art. I, Section 14. The United States Supreme Court has recognized that an accused has the right to waive his right to trial by jury as guaranteed under the Sixth and Fourteenth Amendments. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968), See also United States v. Jennings, 323 F.3d 263, 275 (4th Cir. 2003). Similarly, the South Carolina Rules of Criminal Procedure permit a defendant to waive his right to trial by jury. As is typical with waivers, waivers of the right to counsel and a jury should be knowingly and voluntarily made and supported by court inquiry. See Narciso v. State, 397 S.C. 24, 723 S.E.2d 369 (2012).

In the present case, Appellant made a knowing and intelligent waiver of his right to trial by jury. Judge Jennings informed the Appellant of various rights. (R. p. 16). Appellant knew of his right to a jury trial in this case when he elected to waive it. (R. p. 7). Appellant admits that Judge Jennings tried to move his case to the jury trial roster and that Appellant "promptly corrected the judge, alerting him that I had not requested a jury trial, and would rather have a trial 'today.'" (R. p. 7). This meets the knowing and voluntary waiver standard.

Appellant has presented no evidence of anything that would have prevented him from making an intelligent waiver of his right to trial by jury. For instance, there is no evidence that he was laboring under a mental or physical defect, or even overwhelming immediate stress.[8] To the contrary, based on Appellant's affidavit, he understood that a jury trial would take place a

[4] Appellant makes only one passing remark about his right to a trail by jury in his brief. He presents no arguments regarding any deprivation of this right. (R. p. 11).

[5] The Sixth Amendment right to trial by jury has been made applicable to criminal proceedings in State courts. See Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444 (1968).

[8] See Prince v. State, 301 S.C. 422, 312 S.E.2d 462 (1990) (noting defendant's mental illness has an effect on the intelligent waiver of constitutional rights).

later date. Thus, if Appellant were flustered and felt the need to compose himself[9] he clearly was aware of the opportunity to do that and come back later. Appellant, however, affirmatively wanted to proceed "today" and made rational choices to bring his desire to fruition. (R. p. 7). His right to a jury trial was thus validly waived.

II. APPELLANT'S COMPLAINTS ABOUT THE SUFFICIENCY OF THE MUNICIPAL COURT'S RETURN DO NOT ENTITLE HIM TO RELIEF.

A. Objections to the Sufficiency of the Municipal Court Return Were Not Preserved.

South Carolina's "rule of issue preservation states that if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal." State v. Passmore, 363 S.C. 568, 583, 611 S.E.2d 273 (Ct. App. 2005).

Appellant contends that the required Return to the Circuit Court is statutorily insufficient, despite the fact that the Appellant's Notice of Appeal and Affidavit submitted to the Circuit Court did not object to the sufficiency of the Municipal Judge's return. (R. p. 12-13). This is confirmed by the fact that Judge Dennis' Order does not address any of these issues.[10] (R. p. 3). Since this issue was not raised on the appeal to the Court of Common Pleas, the Appellant is precluded from raising this issue "for the first time on appeal" to this Court. Passmore, 363 S.C. 568.

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[9] Appellant argues that he was upset that bailiffs gruffly required him to remove a head covering. Had Appellant been so upset he was unable to think clearly he should have accepted the Court's offer to return on a different day after seeking counsel. Appellant devotes much discussion to labeling the bailiffs conduct as "religious discrimination." Such claims may or may not be cognizable in civil court, but are irrelevant for purposes of this criminal appeal.

[10] See Durham v. Blackard, 313 S.C. 432, 438 S.E.2d 259 (Ct. App. 1993) (citing Hilton Head Resort v. Resort Investment Corp., 311 S.C. 394, 429 S.E.2d 459 (Ct. App. 1993) (stating Court of Appeals precluded from treating issue on appeal where lower court did not mention the issue in its order and appellant made no motion pursuant to Ruel 59(e), SCRP, to require lower court to do so)).

B. Even if the Issue of the Return Raised by Appellant Was Preserved, the Conviction Should Stand Because No Error of Law Occurred.

Appellant's contention that the Return made to the circuit court was insufficient because of a lack of a transcript of the municipal court proceeding is simply false. Municipal courts in South Carolina are not courts of record. See Elletson v. Dixie Home Stores, 231 S.C. 565, 99 S.E.2d 384 (S.C. 1957); SC Code Ann § 14-25-5 et al. Municipal courts are not required to, and typically do not, furnish a court reporter or transcript. Instead, S.C. Code 14-25-105 clearly provides that "[i]n the event of an appeal, the municipal judge shall make a return to the Court of Common Pleas, and the appeal must be heard by the presiding judge upon the return." Thus, Appellant's argument that Judge Markley Dennis erred in hearing the first level of appeal based on a return rather than a transcript is barred by statute.

Ironically, Appellant's argument that the "Return" should have included within it a transcript of municipal court proceedings is further barred by the very statute upon which Appellant relies. Appellant emphasizes Section 14-25-105's statement that "When the testimony has been taken by a reporter as provided herein, the return shall include the reporter's transcript of the testimony." The problem is, the statute's own words limit the transcript rule only to instances "**when** the testimony has been taken by a reporter as provided herein." Id. (emphasis added.) The unavoidable conclusion is that when testimony *has not* been taken by a court reporter, no transcript accompanies the Return.

Appellant also cannot blame the City for failing to arrange for a transcript. Either party may arrange for a court reporter at its own cost. See SC Code Ann. § 14-25-195. Appellant did not make such arrangements. Further, the North Charleston Municipal Court does maintain an audio recording system. See (R. p. 13). Appellant admits that he

was able to listen to a copy of this recording. (R. p. 13). Thus, there was nothing that would have prevented Appellant from arranging for a court reporter to make a certified transcript. *Appellant's* failure to make such arrangements as required by S.C. Code 14-25-195 cannot be called a deficiency by the *court*. The lack of a transcript in this case is directly attributable to the fact that the Appellant himself failed to make the necessary arrangements.

III. CONCLUSION

Appellant had no right to counsel in this case because no term of imprisonment was imposed upon the defendant by the municipal court. Even if such a right existed, Appellant through his own affirmative action validly waived his right to counsel and trial by jury. Thus, no constitutional violations occurred in this case and there is no basis to overturn Appellant's conviction.

Appellant's complaints about the Municipal Court's "Return" are similarly unproductive. Appellant failed to preserve the issue of sufficiency of the required Return. This Court should summarily dismiss that issue. However, even if this Court were to find that the issue was preserved for appeal, Appellant's interpretation of § 14-25-105 as requiring a transcript is incorrect. The statute clearly recognizes that a transcript is not required and may not exist.

For the foregoing reasons, Respondent respectfully requests that this Honorable Court affirm the judgment of the Circuit Court.

Respectfully Submitted:

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30th day of October, 2012.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2011-CP-10-07921

City of North Charleston, Respondent,

v.

Johnathan M. Daniels, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

October 29, 2012

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PROOF OF SERVICE

I certify that I have served the Respondent's Final Brief on Johnathan M. Daniels by depositing a copy of it in the United States Mail, certified postage prepaid, on October 30, 2012, addressed to his attorney of record, Johnathan Daniels, Post Office Box 70301, North Charleston, South Carolina 29425. Attached, please find Exhibit A which shows the certified return receipt signed by Johnathan Daniels.

November 20, 2012

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