

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

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THE STATE,

APPELLANT,

V.

ROBERT S. JOLLY,

RESPONDENT

Appellate Case No. 2011-190688

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FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Did the trial judge commit reversible error by dismissing two indictments for obtaining property by false pretenses based on an alleged double jeopardy violation where the elements of the indicted offense of obtaining property by false pretenses were distinctly different from the elements of Jolly's earlier offense of criminal contempt and each of those offenses required proof of a fact the other did not?

COUNTER STATEMENT OF ISSUE ON APPEAL

Whether trial judge Culbertson correctly dismissed two indictments for obtaining property by false pretenses where Judge Baxley's prior finding of criminal contempt for respondent's actions with the homeowners merged with his finding of respondent's criminal contempt, in part, for the same actions of obtaining property by false pretenses that he enjoined respondent from participating in before he held the criminal contempt hearing?

STATEMENT OF THE CASE

Respondent agrees with appellant's statement of the case.

## ARGUMENT

Trial judge Culbertson correctly dismissed two indictments for obtaining property by false pretenses where Judge Baxley's prior finding of criminal contempt for respondent's actions with the homeowners merged with his finding of respondent's criminal contempt, in part, for the same actions of obtaining property by false pretenses that he enjoined respondent from participating in before he held the criminal contempt hearing.

### **Relevant Facts**

On March 12, 2009, the Honorable J. Michael Baxley issued a notice of hearing and Rule to Show Cause ordering appellant Jolly, Randall Sain, Linda Sain "and any person connected in any way to Robert Jolly and Associates" to be present at a hearing and to retain counsel. R. 47. The hearing was held before Judge Baxley on April 16, 2009.<sup>1</sup>

In addition to the Attorney General's complaint against respondent for allegedly engaging in the unauthorized practice of law, the Attorney General's Office also filed a complaint alleging respondent was in violation of the South Carolina Unfair Trade Practices Act for his actions with handling the mortgages of Homeowners in arrears.

Almost two years later on April 12, 2011 respondent's case was called to trial before the Honorable Benjamin H. Culbertson. J. Wesley Locklair, III represented respondent. R. 1.

The State called an indictment against respondent for the unauthorized practice of law and five separate indictments for obtaining property by false pretenses. R. 2, ll. 11-24.

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<sup>1</sup> The duty judge for this court granted the State's Motion to Strike any reference to this hearing in the brief.

Defense counsel moved to dismiss in part based upon double jeopardy. Counsel noted respondent had been held in contempt at the April 16, 2009 hearing essentially for the facts alleged by the prosecution involving two of the alleged victims the “Maucks<sup>2</sup> and the Reinhardts.” Defense counsel also argued that Judge Baxley’s direct contempt order stated respondent had been involved in a scheme, filed frivolous pleadings and was involved in contempt for which he was sentence to six months in prison. R. 7, l. 18 – 11, l. 8.

The Assistant Attorney General noted that respondent tried to frivolously remove the case before Judge Baxley to Federal Court the day before the hearing, and he offered: “I would say it was the entirety of Mr. Jolly’s actions that day to Judge Baxley, the events, a contempt for the proceedings and for the court.” R. 11, l. 10 – 12, l. 24.

Judge Culbertson ruled he would have to carefully read Judge Baxley’s order before he could rule on the reason respondent was held in criminal contempt before he could rule on the double jeopardy issue. R. 19, l. 17 – 22, l. 16.

Defense counsel argued that respondent was held in contempt for his actions with homeowners, and the judge ultimately ruled he was going to deny the double jeopardy motion as to everyone *except possibly the indictments involving Mauck and Reinhardt*. He said that those two indictments were his only consideration as to the double jeopardy motion. R. 26, ll. 10-20. The judge then took a break to consider the matter. R. 27, ll. 9-18.

Subsequently, the judge ruled that the two indictments for obtaining property by false pretenses involving Mauck and the Reinhardts were barred by double jeopardy. The judge ruled that part of the reason respondent was held in direct and criminal contempt was

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<sup>2</sup> Ernest Mauck’s surname is spelled two different ways in the transcripts: Mautk and Mauck. For ease of reference “Mauck” will be used throughout.

for the indictments involving the scheme with Mauck and the Reinhardts. R. 43, l. 3 – 46, l. 10.<sup>3</sup>

### **Discussion**

In Judge Baxley's Order for Temporary Injunction and Criminal Contempt filed on July 8, 2010, he found respondent in criminal contempt of court and sentenced him to six months imprisonment following the day in court on April 16, 2009. R. p. 48. The judge ruled that respondent's conduct deceived homeowners, and contributed to them having foreclosure actions currently pending and continuing against them. R. p. 66. The order also noted that respondent's conduct caused the Master in Equity to return over forty-five cases to the clerk of Common Pleas. R. p. 59.

The order also found respondent in contempt for interfering with the orderly adjudication of dozens of foreclosure actions. In addition, the order found respondent's preparation, execution, and improper notarization of quit claim deeds constituted a fraud upon the court. The court also wrote that "Defendant Jolly's decision to call Brewer [and Yura as witnesses at the April 16, 2009 hearing] and remarkable lack of candor in the testimony he elicited from them was an affront to the integrity of the judicial process and evidenced an intention to destruct, degrade, and undermine the administration of justice." R. p. 68.

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<sup>3</sup> Although the trial judge said he would issue a written order, a written order was never written or filed. Undersigned counsel has spoken to opposing counsel who contacted the trial judge who informed the Attorney General's Office that no written order would be forthcoming and that his oral ruling was the only one in this case.

The order further stated that: “Defendant Jolly’s orchestration of the aforementioned Scheme, the Foreclosure Actions, and his conduct before the Court at the April 16th hearing has interfered with judicial proceedings, exhibited disrespect for the Court, and hampered parties and witnesses. Further, Defendant Jolly’s orchestration of the aforementioned Scheme, the Foreclosure Actions, and his conduct before the Court at the April 16th hearing was calculated to obstruct, degrade, and undermine the administration of justice.” R. p. 68.

Thus, respondent was held in direct criminal contempt, in part, because he obtained property from Homeowners under false pretenses. At issue here were Homeowners Mauck and the Reinhardts.

The State relies on State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011). In Brandt, the Supreme Court noted that because the federal court in Brandt v. Ozmint, 636 F.3d 124 (4th Cir. 2011), effectively vacated the defendant’s prior conviction he could no longer assert double jeopardy barred his subsequent forgery conviction after he had been found in direct contempt of court for submitting a false document in a medical malpractice action. The Court also noted the divergent rulings of the United States Supreme Court in United States v. Dixon, 509 U.S. 688 (1993), which overruled Grady v. Corbin, 494 U.S. 508 (1990). See, State v. Brandt, 393 S.C. at 537, n. 5-6, 713 S.E.2d 591, 596, n. 5-6.

The Court in Brandt addressed the double jeopardy issue anyway. It found that because the offenses of direct criminal intent and forgery required proof of the fact the other does not need that Brandt’s subsequent prosecution for forgery did not violate the double jeopardy clause because they involved deciding different elements.

Here, Judge Baxley issued an injunction against respondent for the very actions that were the subject of the two indictments. He therefore took the extraordinary step of

enjoining respondent from engaging in the same conduct for which he was indicted in indictments 2009-GS-26-2947 and 2948 as they pertain to obtaining property by false pretences from the Reinhardts and Maucks. R. 45, ll. 1-23. There were several other indictments against respondent that were allowed to proceed by Judge Culbertson.

After issuing the injunction enjoining future criminal acts, Judge Baxley then held a contempt hearing at which he found appellant in direct contempt of court for his activities in obtaining property from these two witnesses and victims, Ernest Mautk and Ester Reinhardt. This Court can affirm for any reason appearing the record.

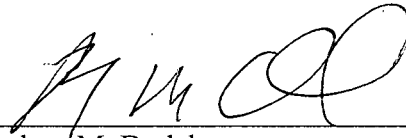
This record straightforwardly reveals that respondent was held in criminal contempt for obtaining property under false pretenses from the two victims who testified in this case. He was indicted for the same offenses. Under state Constitutional law, Article I, §12, this Court can adhere to its decision in State v. Magazine, 302 S.C. 55, 393 S.E.2d 385 (1990), especially since the Supreme Court's latest decision in Brandt only addressed divergent federal Constitutional law double jeopardy law from the United States Supreme Court.

Under the highly unusual facts of this case involving injunctive relief against conduct the court found both criminal and contemptuous, and where respondent was punished for criminal contempt for obtaining the property of the Reinhardts and Maucks under false pretenses, this Court has the authority to affirm the ruling of the trial judge, and should not find reversible error in the legal ruling of the trial judge.

CONCLUSION

The ruling of the trial court should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

This 20th day of September, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 20<sup>th</sup>, 2012



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THE STATE,

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RESPONDENT

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Final Brief of Respondent in the above referenced case has been served upon Mark R. Farthing, Esquire, at the Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 20th day of September, 2012.

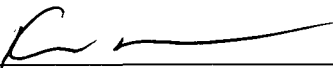


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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me  
this 20th day of September, 2012.



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(L.S.)  
Notary Public for South Carolina

My Commission Expires: October 2, 2013 .