

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals


APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Appeal Case No. 2013-002580

Christopher A. Wellborn, Appellant,

v.

 City of Rock Hill, Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE COURT ERR IN FINDING THE APPELLANT IN CONTEMPT WHEN THERE WAS NO RECORD OF THE PROCEEDINGS?
- II. THE TRIAL COURT JUDGE ERRED IN FAILING TO RECUSE HIMSELF FROM HEARING THIS CASE.
- III. THE ALLEGED CONDUCT OF THE APPELLANT DID NOT COME WITHIN THE PREVIEW OF THE SOUTH CAROLINA CODE SECTIONS 22-3-950 OR 40-5-510.

STATEMENT OF THE CASE

On March 6, 2013, Peter J. Lenzi, Associate Judge for the Rock Hill Municipal Court filed a Verified Petition alleging five counts of contempt of Court against the Appellant. Appellant filed a Motion for Recusal on March 20, 2013. The matter was heard on March 25, 2013. Judge Lenzi issued a written Order on March 28, 2013 in which the Appellant was held in Contempt of Court on two of the five allegations alleged in the Petition. The Appellant timely filed a Notice of Appeal to the Court of Common Pleas of York County, South Carolina. The appeal was heard on August 3, 2013 by the Honorable John C. Hayes, III. Judge Hayes issued a written Order dated September 25, 2013, and filed October 2, 2013. In Judge Hayes' Order the Court reversed one of the findings of contempt against Appellant and upheld the other findings of contempt. The Appellant timely filed a Motion to Reconsider, the Court issued an Order dated November 6, 2013, and filed on November 13, 2013, denying the Motion to Reconsider. On November 29, 2013, the Appellant filed a Notice of Appeal to the South Carolina Appeals Court.

FACTS

The Appellant is an attorney licensed in the State of South Carolina. On January 16, 2013, the Appellant represented David H. Cullen on a charge of reckless driving in a jury trial in the Rock Hill Municipal Court. Prior to the Court date, the Appellant had contacted the Solicitor who was handling the case and asked if there would be a trial that day. The Appellant was informed that if there was going to be a trial the Solicitor would let him know. The Appellant heard nothing else about the case being tried and on the trial date took his car to have repairs done. While the Appellant was having his car repaired he received a call from the Solicitor stating they were striking a jury.¹ The Appellant contacted his client and arrived at Court later that morning.² At the beginning of the trial the Appellant and his client were not in Court. According to the Petition filed by Judge Lenzi, the Appellant asked for permission to advise the jury during his opening statement as to why neither he nor his client was present for jury selection. According to the Petition, the Court denied that request and instructed the Appellant not to make any comment concerning him or his client's tardiness in appearing for Court in any manner in the jury's presence.³ The Appellant testified that Judge Lenzi ruled that neither party were to go into any detail or explanation as to why the Appellant or his client were late or not present during the time of jury selection.⁴ The Petition alleges that, "as he was leaving the Courtroom, Mr. Wellborn in the jury's presence, once again stated he wanted

¹ R. p. 86, line 14 – p. 88, line 18.

² R. p. 89, line 21 – p. 98, line 7.

³ R. p. 18.

⁴ R. p. 95, line 9-16.

to explain to the jury why he and his client were late in arriving to Court”.⁵ Appellant testified that he asked that after opening statements if he would be allowed to go out into the hall to see if his client had arrived. The Appellant testified as follows, “I made no further comment regarding my lateness to Court or where I was, or anything else, during the entire course of the trial, either in the jury’s presence or out of the jury’s presence, in the Courtroom or in the hallway, or anywhere else”.⁶ Judge Lenzi found the Appellant in contempt of Court for making a comment for requesting in the presence of the jury permission to explain to the jury why he and his client was late for Court and fined the Appellant \$500.00.⁷

ARGUMENT

I. THE COURT ERRED IN FINDING THE APPELLANT IN CONTEMPT WHEN THERE WAS NO RECORD OF THE PROCEEDINGS.

Before a person may be held in contempt the record must be clear and specific as to the acts or conduct upon which such finding is based. State v. Harper 297 S.C. 257, 376 S.E. 2d 272 (1989). Contemptuous conduct must be clearing and specifically reflected in the record. State v. King 306 SC 335, 412 S.E. 2d 375 (S.C. 1991); Brasington v. Shannon 288 S.C. 183, 341 S.E. 2d 130 (S.C. 1986). There was no record made of the proceedings in which the Appellant was representing his client therefore no records of those proceedings exist.⁸ The lack of record was prejudicial to the Appellant in this case. There was a factual dispute between the trial judge and Appellant as to what actually occurred. According to the Petition filed by Judge Lenzi, he instructed the Appellant not to make any comment about he or his client’s tardiness in appearing for

⁵ R. p. 19.

⁶ R. p. 96, line 12-23.

⁷ R. p. 4.

⁸ R. p. 117, line 10-17.

Court in any manner in the jury's presences. Judge Lenzi alleged in his Petition that the Appellant made a request in the jury's presences to explain to the jury why he and his client were late in arriving to Court. The Appellant denied the allegation of the Petition.⁹ In the present case the judge holding the contempt hearing and making a factual finding was the same judge who was making the allegation. There is no record from the trial to substantiate the factual allegations make by Judge Lenzi. In the present case we have a situation in which Judge Lenzi is hearing the contempt proceeding, hearing the Appellant's testimony and judging the creditability of the Appellant's testimony and at the same time making the allegations against the Appellant. A record of the trial proceedings is critical in this situation.

II. THE TRIAL COURT JUDGE ERRED IN FAILING TO RECUSE HIMSELF FROM HEARING THIS CASE.

Cannon 3.E(1)(d)(IV) of the Code of Judicial Conduct, Rule 501 SCACR provides that a judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned and that the trial judge impartiality may be questioned because; (2) "to the judge's knowledge that he or she is likely to be a material witness in the proceedings."

At the beginning of the contempt proceeding the Appellant's counsel moved that the judge recuse himself.¹⁰ The motion for recusal was denied.

In the present case the factual allegations which allegedly constituted the contempt were made by Judge Lenzi by way of a Verified Petition. The Appellant denied the factual allegations of the Petition. It is obviously impossible for the trial judge to be

⁹ R. p. 96, line 12-23.

¹⁰ R. p. 73, line 15 – page 74, line 6.

impartial in making a determination of the actual allegations in ruling between his version of what occurred and the Appellant's version of what occurred. While the Court has inherit power to punish for contempt committed in the Court's presence, in most cases there is a record of the proceeding. Since there was no record of the proceedings there had to be a factual determination made as to what actually occurred. In the present case the actual determination was made by the person making the allegations.

The Judge did not testify but went forward with the case based on the Petition and did not testify or make himself available for cross-examination.¹¹ Judge Lenzie's failure to recuse himself and make himself available for cross-examination violated the Appellant's right of confrontation as guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 14 of the South Carolina Constitution. Judge Lenzie relied on allegations made in a Petition filed by himself. He did not make himself available for cross-examination as to the allegations he made. Appellant was denied the right to cross-examine the only witness to the alleged contemptuous conduct. The trial Judge should clearly have recused himself from judging the accuracy of a Petition filed in which he was making the allegations against Appellant.

III. THE ALLEGED CONDUCT OF THE APPELLANT DID NOT COME WITHIN THE PREVIEW OF THE SOUTH CAROLINA CODE SECTIONS 22-3-950 OR 40-5-510.

There was not a finding in the Order of the Municipal Court that the Appellant violated §22-3-950 or §40-5-510. The Court of Common Pleas held that the Appellant's conduct constituted an open and direct contempt to the Court in violation of §40-5-510 South Carolina Code of Laws. The Court of Common Pleas did not address whether the Appellant's conduct violated §22-3-950 South Carolina Code of Laws.

¹¹ R. p. 85, line 6-12.

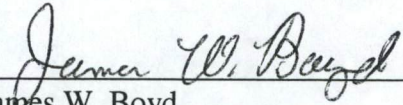
Section 22-3-950 provides that a magistrate may punish for contempt a person who, "shall offer an insult to the magistrate or a juror or is willfully guilty of an undue disturbance of the proceedings before the magistrate while sitting officially". There is no evidence of the proceedings that the Appellant by requesting permission to inform the jury why he and his client were late was offering an insult to the Judge or caused an undue disturbance in the proceedings. Therefore §22-3-950 does not apply to Appellant's alleged conduct.

Although the trial Court did not make a finding as to violation of §40-5-510 the Court of Common Pleas found that Appellant's alleged conduct constitutes, "an open and direct contempt of Court", in violation of §40-5-510 South Carolina Code of Laws. Section 40-5-510 provides for consequences for attorney's if, "in the presence of such Court, they are guilty of any disorderly conduct causing an interruption of business or amounting to an opening and direct contempt to the Court, its authority or person." This section requires two elements. The first is that there must be disorderly conduct on the part of the attorney. The second is that the disorderly conduct must cause a disruption of business or amount to an open or direct contempt of the Court its authority or person. While disobedience to a Court order may amount to an open and direct contempt to the Court it does not necessarily constitutes disorderly conduct. In this case there is no evidence that the Appellant engaged in disorderly conduct. The Appellant is to have alleged to have made a request to the Court in the presence of the jury in violation of a Court order. There was no evidence or testimony that the alleged request caused a disruption or that the Appellant acted in a disorderly manner in making the request. Therefore, §40-5-510 does not apply to this case.

CONCLUSION

For all the foregoing reasons the Appellant request that this case be reversed.

Respectfully Submitted,



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August 19, 2014

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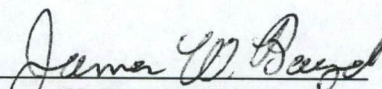
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CERTIFICATE OF COUNSEL

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


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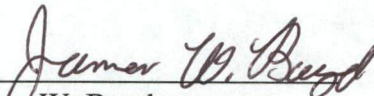
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PROOF OF SERVICE

I, James W. Boyd, certify that I served the within Final Brief of Appellant on Respondent by depositing a copies of the same in the United States mail, postage prepaid, addressed to its attorney of record, Paula Knox Brown, Assistant Solicitor, 201 E. Main Street, 3rd Floor, Rock Hill, SC 29730, I further certify that all parties required by Rule 208 to be served have been served.


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