

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY  
Court of General Sessions

R. Lawton McIntosh Judge

C.A. Nos.: 2017-GS-04-0365  
Appellate Case no. 2019-001502

State of South Carolina,

v.

Respondent,

Dustin Lee Hooper,

**RECEIVED**  
Appellant. FEB 03 2020  
SC Court of Appeals

APPELLANT'S RETURN TO  
RESPONDENT'S MOTION TO DISMISS

Appellant Dustin Hooper, through his undersigned counsel, respectfully submits this Return to Respondent's Motion to Dismiss, filed on January 22, 2020.

INTRODUCTION

This case involves the interpretation of South Carolina's DUI Laws, in particular the videotaping law, or S.C. Code Ann. §56-5-2953, and the application of the doctrine laid down in the State vs. Landis, 362S.C. 97, 606 S.E.2d 503 (2004).

Respondent contends that the ruling of the Court in Landis governs the instant action, while Appellant asserts that the present action is not on all fours with Landis. Appellant believes that the case of Town of Mt. Pleasant v. Roberts, 393 S.C. 332 (2011) is more on point with the facts of this case.

Appellant submits that the trial court erred in proceeding with the trial because Appellant's arrest and subsequent conviction was not done in accordance with the DUI Videotaping Law.

### **PROCEDURAL BACKGROUND**

The parties in this case went to trial on March 6, 2019 for a DUI charge against herein Appellant. The jury found the Appellant guilty. On March 8, 2019, the trial court issued an Order indicating it was deferring sentencing until after an appeal has concluded. Pursuant to Rule 29 of South Carolina Rules on Criminal Procedure (SCRCrimP), Appellant moved to reconsider. On July 25, 2019, the trial court denied the motion and at the same entered sentence for the Appellant.

Appellant filed a Motion for Relief of Judgment on August 5, 2019 and served a copy of same by mail to herein Respondent. In his motion, Appellant prayed for the trial court to vacate the judgment based on inadvertence. Appellant averred that the trial court failed to rule on the issues of absence of video and failure by Respondent to provide a sworn affidavit as an exception. Realizing that he has mistakenly named his previous motion, Appellant filed a motion to Amend or rename his motion for relief from judgment to that of Motion to Vacate Judgment. Appellant asserted that the contents of the motion as well as the prayer for relief should control the nature of the motion.

On August 27, 2019, the trial judge filed an Order denying the Motion to Amend, Motion to Vacate and Motion for Relief of Judgment. A hearing was held on August 29, 2019 where the court issued a second Order denying Appellant's Motion to Vacate Judgment. Appellant perfected his Notice of Appeal on August 30, 2019.

Pursuant to Rule 208 of the South Carolina Appellate Rules of Court (SCACR), Appellant filed his Initial Brief of the Appellant and Designation of Matter to be Included on Record on Appeal on December 23, 2019. Respondent moved for an extension to file its Initial Brief, which was granted by the Court. On January 22, 2020, Respondent filed a Motion to Dismiss challenging the timeliness of the appeal. Thus, this Return.

### ARGUMENT

#### **THE APPEAL WAS PERFECTED PURSUANT TO RULE 203(b)(2) OF THE SOUTH CAROLINA APPELLATE RULES**

In its Motion to Dismiss, Respondent contends that Appellant filed his Notice of Appeal outside of the reglementary period. Respondent raised two issues in its motion: (1) that Appellant should have filed his Notice of Appeal on August 5, 2019 after the denial of the Motion for Reconsideration; and (2) that even assuming that the subsequent motion(s) was proper that the same was filed outside of time. Appellant believes otherwise.

#### **Appellant had a right to file his Motion to Vacate Judgment, under Rule 29 SCRCrimP.**

Respondent asserts that the trial court did not have jurisdiction to consider Appellant's Motion to Vacate Judgment, citing the case of State v. Pfeiffer, 427 S.C. 10, 828 S.E.2d 764 (2019). The Court in Pfeiffer stated that:

Successive Rule 29(a) motions are generally not permitted. However, where a second Rule 29(a) motion is related to the disposition of the first Rule 29(a) motion, the trial court retains authority to hear and dispose of the subsequent motion, provided the subsequent motion is filed within ten days of the disposition of the prior post-trial motion.

In Pfeiffer, Respondent pled guilty to criminal conspiracy and two counts of securities fraud. and entered into a negotiated plea with the Appellant on September 18, 2013. A dispute

on the interpretation of the sentencing arose which led Respondent to file a Motion to Correct Clerical Error. On October 8, 2013, the trial court entered an amended sentence clarifying the sentencing sheets. On October 17, 2013, Respondent filed a motion seeking a reduced sentence based on the codefendant's lighter sentence. Appellant challenged the timeliness of the filing of the second motion. The State argued that Pfeiffer's second motion was untimely because more than ten days had elapsed since the original sentencing and the second motion was in no manner related to the first. The trial court granted the motion. Upon appeal, the Supreme Court found for the Appellant ruling that the second motion was untimely because the same was not related to the first motion for correction of clerical errors.

The above ruling in *Pfeiffer* does not apply in this case because the Motion to Vacate Judgment filed by Appellant was related to the prior motion. The motion to vacate was filed in response to the trial judge's failure to specifically rule on the issues of the absence of video and failure by Respondent to provide a sworn affidavit as an exception to the DUI Videotaping Law. These issues were raised by Appellant in his Motion for Reconsideration. The judge's inadvertence in failing to rule on Appellant's issues in his Motion for Reconsideration, is a valid ground for a motion to vacate.

**The subsequent motions were timely filed.**

Respondent contends that the Motion for Relief of Judgment and Motion to Amend and Motion to Vacate were not timely filed. Respondent claimed that since the Motion for Relief of Judgment was filed on August 8, 2013. The motion was mailed to the court and Respondent on August 5, 2013. Absent a provision prohibiting filing and serving motions in criminal cases by mail, Appellant believes that filing and service by mail is complete upon mailing.


Furthermore, Respondent did not raise the issue of timeliness in its Response to Defendant's Motion for Relief of Judgment Pursuant to Rule 60(b)(1). (Exhibit 1). Neither did it register its objection during the hearing of the motions on August 29, 2019. Objections not raised in the trial court cannot be relied on in the appellate court. Wilson v. Clary, 212 S.C. 250, 47 S.E.2d 618 (1948) as cited in Doe v. SBM, 327 S.C. 352 (1997). "As a general rule, an issue may not be raised for the first time on appeal but must have been raised to the trial judge to be preserved for appellate review. Issues not raised in the trial court will not be considered on appeal." Anonymous v. State Board of Medical Examiners, 323 S.C. 360, 473 S.E.2d 870, 879 (Ct. App. 1996).

**The Notice of Appeal was timely filed.**

Rule 29(a) of the SCRCrimP provides that the time for appeal for all parties shall be stayed by a timely post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion. The trial court issued an Order denying Appellant's Motion to Vacate on August 29, 2019. Appellant served and filed his Notice of Appeal on August 30, 2019, within the time limit.

**CONCLUSION**

For all reasons set forth above, Appellant respectfully requests this Honorable Court deny Respondent's Motion to Dismiss the appeal.

  
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*Attorney for Appellant*

Anderson, SC  
January 30, 2020.

FORM 7

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY  
Court of General Sessions

R. Lawton McIntosh Judge

C.A. Nos.: 2017-GS-04-0365  
Appellate Case no. 2019-001502

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SC Court of Appeals

State of South Carolina,

Respondent,

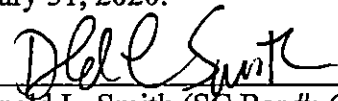
v.

Dustin Lee Hooper,

Appellant.

**PROOF OF SERVICE**

I certify that I have served an original and six (6) copies of Appellant's Return to Respondent's Motion to Dismiss and Proof of Service of the same, upon The Honorable Jenny Abbott Kitchings, Clerk of Court South Carolina Court of Appeals, PO Box 11629, Columbia, SC 29211; and a copy of the same to Respondent, by and through its counsel of record, Attorney General Alan Wilson, and Senior Assistant Deputy Attorney General William M. Blich, Jr. at the Office of the Attorney General, at PO Box 11549, Columbia, SC 29211, by depositing copies of the same in the United States Mail, postage prepaid, on January 31, 2020.



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*Attorney for Appellant*

Anderson, SC  
January 31, 2020.

**FORM 8**  
**LETTER TO THE COURT OF APPEALS CLERK OF COURT**

January 31, 2020

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia SC 29211

**RE: The State v. Dustin Lee Hooper**  
**Appellate Case No. 2019-001502**


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FEB 03 2020  
SC Court of Appeals

Dear Ms. Kitchings:

Please find enclosed the following materials for filing:

- (1) An Original and Six (6) copies of Appellant's Return to Respondent's Motion to Dismiss; and,
- (2) Proof of Service for the same.

Sincerely,

  
Donald L. Smith, (SC Bar#6699)  
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[attorneydonaldsmith@gmail.com](mailto:attorneydonaldsmith@gmail.com)  
*Attorney for Appellant*

Cc:

Hon. Alan Wilson, South Carolina Attorney General  
Mr. William M. Blicht, Jr., Senior Assistant Deputy Attorney General



Attorney Office of Donald Smith  
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The Honorable Jenny Abbott Kitchings  
Clerk of Court South Carolina Court of Appeals  
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