

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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SC Court of Appeals

APPEAL GREENVILLE COUNTY

Court of Common Pleas

Perry H. Gravely, 13th Circuit Judge

Appellate Case No. 2020-001182

Sean Eric Roach,

Respondent,

v.

Lee C. Yarborough

Appellant,

Of whom Yarborough is the
Appellant.

INITIAL BRIEF OF APPELLANT

s/ Wesley D. Few/



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ATTORNEYS FOR APPELLANT LEE C.
YARBOROUGH

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Vacation Time of Hilton Head, Inc. v. Kiwi Corp., 312 S.E.2d 20, 21 (1984) 4, 8, 9, 10

Statutes

S.C. Code Ann. § 16-3-1700 *et seq.*..... 5, 8, 9, 10, 12, 14, 16

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Other Authorities

None at this time

STATEMENT OF ISSUE(S) ON APPEAL

This appeal presents the following errors: (1) the Circuit Court misconstrued the standard of review, and did not give reasons why it found contrary facts under Vacation Time, (2) the statute does not grant any power to vacate an order, only to reverse or affirm, (3) the statutory procedure for a defective record from the Magistrate's Return was not followed, (4) the errors noted by the Circuit Court were, at best, technical and did not affect the merits of the case, (5) the record includes an abundance of evidence to support the Magistrate's finding and no evidence contradicting it, and (6) Mr. Roach's counsel's cross-examination was irrelevant to the Magistrate's finding of Harassment in the 2nd Degree.

STATEMENT OF THE CASE

This is an appeal from an order of the Circuit Court sitting as an appeals court, vacating a restraining order issued on March 9, 2020, under S.C. Code Ann. § 16-3-1700.

This appeal arises out of a proceeding in Magistrate's Court which resulted in a Restraining Order issued on March 9, 2020 against Appellant. The Magistrate noticed a hearing for December 2, 2019, and Mr. Roach appeared and asked for sixty (60) days to obtain counsel. On December 5, 2019, Yarborough filed her Verified Complaint and Motion for a Restraining Order. On December 10, 2019, the Magistrate Court issued an order restraining the defendant under Section 16-3-1700. Mr. Roach appealed that order, and Yarborough filed a motion to dismiss the appeal. The Circuit Court, Judge Miller, remanded the case back to the Magistrate's Court for a hearing. A second hearing was held on March 9, 2020 resulting in the Restraining Order from which this appeal has been taken.

Appellant's Notice of Appeal asserts numerous grounds for vacating the Magistrate's Order: (1) failure to grant Appellant's Motion to Dismiss; (2) failure of Respondent to meet her burden; (3) failure of Magistrate's Order to list specific acts of harassment; (4 & 5) order not supported by the testimony; and (6) improperly issued Order for Federal Firearms Prohibition without proper finding.

FACTS AND PROCEDURAL HISTORY

The facts of the relationship between the parties is set forth in detail in the Dec. 5, 2019 Verified Complaint and Motion for a Restraining Order.

The procedural history is set forth above and includes the following dates:

- Dec. 2, 2019 – Mr. Roach appears at a hearing in West Greenville Summary Court;
- Dec. 5, 2019 – Yarborough files Verified Complaint and Motion for Restraining Order;
- Dec. 10, 2019 – West Greenville Summary Court issues Restraining Order;
- Jan. 10, 2020 – Roach appeals;
- Jan. 30, 2020 – Yarborough files motion to dismiss appeal;
- Feb. 27, 2020 – Circuit Court, Judge Edward W. Miller, issues order remanding case to Magistrate Court;
- March 9, 2020 – West Greenville Summary Court, Judge Darrell S. Fisher, holds hearing;
- March 9, 2020 – Magistrate Judge Darrell Fisher issues second Restraining Order;
- March 17, 2020 – Roach appeals March 9, 2020 order; and
- July 24, 2020 – Circuit Court issues order vacating Restraining Order.

STANDARD OF REVIEW

The standard of review appears to be set forth in S.C. Code Ann. § 18-7-170, which provides as follows:

Upon hearing the appeal the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact.

Id.

ARGUMENT

This appeal presents the following errors: (1) the Circuit Court misconstrued the standard of review, and did not give reasons why it found contrary facts under Vacation Time, (2) the statute does not grant any power to vacate an order, only to reverse or affirm, (3) the statutory procedure for a defective record from the Magistrate's Return was not followed, (4) the errors noted by the Circuit Court were, at best, technical and did not affect the merits of the case, (5) the record includes an abundance of evidence to support the Magistrate's finding and no evidence contradicting it, and (6) Mr. Roach's counsel's cross-examination was irrelevant to the Magistrate's finding of Harassment in the 2nd Degree.

The lower court's order applies a standard of review under Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp, 280 S.C. 232, 312 S.E.2d 20, 21 (S.C. App. 1984). The Court of Appeals in Vacation Time dealt with an appeal of an ejectment proceeding, in which the Circuit Court also had "concurrent jurisdiction."¹ Id.

The only issue addresses in Vacation Time related to whether or not the Magistrate properly concluded that the landlord agreed to accept a late payment from the tenant under the terms of their lease. Id. at 21. The Magistrate had found the tenant was justified in not paying rent based on the testimony, presumably as well as any correspondence between the parties and the language in the lease. The Circuit Court concluded that the factual finding of the Magistrate was in error. Id. at 21 (noting, "The testimony of each sides' witnesses is in direct conflict.").

In setting forth its review standard applied in this case, the Circuit Court

¹ Section 16-3-1750(A) states, "the magistrates court has jurisdiction over an action seeking a restraining order against a person engaged in harassment in the first or second degree or stalking."

order quotes language from Vacation Time, as follows: “the Circuit Judge, sitting in an appellate capacity has the ability to make a determination in the same manner as Circuit Courts in trials without a jury, and to reverse a judgment for errors of fact, even though the Circuit Judge may not have had the opportunity to observe the demeanor of the witnesses.” Id. at 2.

Yarborough respectfully submits that this quoted language from the factually limited holding in Vacation Time misconstrues S.C. Code Ann. § 18-7-170, which instead states:

Upon hearing the appeal the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact.

Id. (underline emphasis added).

Further, as noted by the Court of Appeals in Vacation Time, the decision there, relating to an ejectment proceeding, was one in which the Magistrate Court / Summary Court and the Circuit Court had “concurrent” jurisdiction. Id. at 21. As noted above, the scope of review in Vacation Time was limited to one issue, namely, *arguably*, interpretation of the subject lease agreement. The opinion itself is only five paragraphs, and notes specifically, “[t]he Circuit Judge found greater weight in the testimony of Vacation Time’s witnesses.” Here, however, Roach did not testify, but only had his attorney seek to cross-examine Yarborough, with a focus on the “optional” provisions to prove Harassment in the 1st Degree, as set forth in S.C. Code Ann. § 16-3-1700(A)(1) through (4).

In contrast, in this action, the Magistrate’s order dated March 9, 2020, which the South Carolina Court forms apparently require to be made on the Form Order known as SCCA/751,

set forth the following “findings of fact,” using the check boxes found on the required SCCA/751 Form:

1. The Plaintiff lives in Greenville, SC.
2. The Defendant lives at 34 Douglas Ave which is in Greenville County, SC.
3. n/a
4. The Defendant [other] is a Former Employee of the Victim.
5. n/a
6. The Harassment or Stalking, as described herein, occurred in Greenville County, South Carolina.
7. The Defendant has committed the following acts which constitute Harassment in the 1st or 2nd degree or Stalking: Harassment.

Id. at 2 of 3.

Further, the issues to be addressed here, as found by the Magistrate, included more than the one “waiver” issue addressed in Vacation Time, for which the Circuit Court there specifically stated why it reversed the judgment of the Magistrate for factual error. Id. at 21 (stating, the “Magistrate apparently believed [tenant’s] witnesses. The Circuit Judge found greater weight in the testimony of [landlord’s] witnesses.”

To establish Harassment in the 2nd Degree, under S.C. Code Ann. § 16-3-1700(B), Yarborough was required to show the following by a preponderance of the evidence:

"Harassment in the second degree" means a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and causes the person and would cause a reasonable person in his position to suffer mental or emotional distress. Harassment in the second degree may include, but is not limited to, verbal, written, or electronic contact that is initiated, maintained, or repeated.

Id. (underline emphasis added).

The Circuit Court’s order fails to make a specific contrary finding on any element set forth above in Harassment in the 2nd Degree under S.C. Code Ann. § 16-3-1700(B). Instead, the order states, “As reviewed by this Court, the testimony does not

support a finding of harassment 1st or 2nd degree or stalking—which is required for the Magistrate to issue this Restraining Order.” *Id.* at 2. The order does not cite any specific portion of the statute requiring that the Magistrate set forth specific findings of fact.

In the Return filed by the Magistrate on May 19, 2020, addressing item #2 of Mr. Roach’s appeal, it is stated, “After hearing and reviewing the evidence again, I find it in the best interest to issue the Restraining Order, based on the pattern of actions by the Defendant.” *Id.* at 1. The Circuit Court does not address this finding, and does not set forth any specific reasons why it would “reverse the judgment of the court below,” as provided for in S.C. Code Ann. § 18-7-170, which does not specifically provide for “vacating” a “judgment of the court below.” *Id.*

To the extent there was anything lacking or “defective” in the Magistrate’s Return, filed on May 19, 2020, under S.C. Code Ann. § 18-7-60,² the statute specifically authorizes the Circuit Court, acting as the acting as the “appellate court,” to “direct a further or amended return as often as may be necessary and may compel a compliance with its order. And the court shall always be deemed open for this purpose.” *Id.* at § 18-7-80.

The Circuit Court’s order states, “the Magistrate’s [Return] does not summarize any of the testimony or evidence presented nor the basis of his findings,” indicating that the Circuit Court found that Return lacking in such

² S.C. Code Section 18-7-60 does not require any specific form or content in the Return, stating, “The court below shall thereupon, after ten days and within thirty days after service of the notice of appeal, make a return to the appellate court of the testimony, proceedings and judgment and file it in the appellate court.”

respects. However, here, unlike in many other proceedings in the Magistrate Court, which is not typically equipped with a court reporter, the transcript of the proceedings before Judge Fisher on December 2, 2019 (39 pages as filed in the Circuit Court on March 26, 2020), and on March 9, 2020 (120 pages as filed in the Circuit Court on March 26, 2020), were professionally transcribed from the audio / CD recordings provided by the Magistrate Court, therefore, the typical need for a Magistrate to further explain the record and the basis for its findings was not present.

These two transcripts were in addition to Yarborough's Verified Complaint and Motion for a Restraining Order, filed in the West Greenville Summary Court on Dec. 5, 2019, before the Summary Court issued its first Restraining Order on Dec. 10, 2019 (filed in the Circuit Court on Jan. 20, 2020, as part of the first Roach Notice of Appeal in 2020-CP-23-00183). The Dec. 5, 2019 Verified Complaint and Motion for Restraining Order consisted of 74 total pages, as follows: cover letter as page 1, Verified Complaint and Table of Exhibits as pages 2-30, and Exhibits 1-14 as pages 31-74. This verified pleading alone was more than sufficient to establish the elements of Harassment 1st or 2nd Degree or Stalking under S.C. Code Ann. § 16-3-1700, and Mr. Roach never presented any direct evidence to contradict the allegations, and instead of denying the factual allegations, he invoked his 5th Amendment Privilege (Transcript, Mar. 9, 2020, at 12, lines 13-16, Mr. Rothstein stating, "But now that the federal criminal authorities have been contacted, I think, as an abundance of caution, I would take the Fifth Amendment and not have Mr. Roach testify today.").

The Circuit Court's order erroneously stated, "The testimony from the Respondent primarily dealt with some postcards which were sent to 3rd parties and targeted the business where Appellant previously worked and did not appear to target the Respondent (although one of the postcards did identify Respondent)." *Id.* at 3. While it is true that Exhibits 5-12 to the Dec. 5, 2019 Verified Complaint and Motion for Restraining Order did address the eight (8) mailings that coincidentally stopped after Mr. Roach appeared in court on Dec. 2, 2019, the Circuit Court's conclusion that the mailings "did not appear to target the Respondent," is an error under any standard of review, even beyond a reasonable doubt. Specifically the first card (Exhibit 5, 7 pages) consisted of an envelope with Yarborough's picture on it portrayed as "Two Slice Hilly," from the movie *The Help*, and immediately below the picture on the envelope stating, "Starring Lee Yarborough as Two Slice Hillee." Exhibit 6 to the Dec. 5, 2019 Verified Complaint was a postcard substantially identical to picture on the outside of the envelope of Exhibit 5, but also included text on the reverse side of the card deriding Yarborough for a "Country Club" lifestyle, "racism," and being a "Christian." *Id.*

Similarly, Exhibit 10 was a postcard that superimposed the picture of Yarborough's 76 year old father in front of a red-sequin clad stripper, and included bold language at the top of the reverse side stating, "A Christian Woman-owned company, Must value and respect all women?!?," which was obviously also directed at Lee Yarborough. All of these cards were mailed to Yarborough's neighbors, as well as clients of her "Christian Woman-owned company," and even private clubs where she is a member and boards that she serves on. Exhibit 11 also

includes a picture of Yarborough, along with her father and other Propel employees, as well as a hooded figure that Yarborough has described she saw as the grim reaper.

Accordingly, just based on this objective viewing of the record before the court, any finding that states the mailings “did not appear to target the Respondent,” is in error, and is not contradicted by any evidence presented by Mr. Roach or his counsel at the 2nd hearing on March 9, 2020. Still further, this attempt to limit the cards by stating, “although one of the postcards did identify respondent,” shows that the Circuit Court did not consider the undisputed evidence before it in determining whether or not there was a “pattern,” of intrusion into the private life of Yarborough. S.C. Code Ann. § 16-3-1700(D) defines “Pattern” as “two or more acts occurring over a period of time, however short, evidencing a continuity of purpose.” *Id.* The undisputed evidence showed a pattern, and further that there was no “legitimate purpose,” for the mailings.

The Circuit Court’s order does not rebut any of the elements of Harassment in the 2nd Degree, but instead merely concluded, as noted above, that the “the testimony does not support a finding of harassment 1st or 2nd degree or stalking—which is required for the Magistrate to issue this Restraining Order.” *Id.* at 2.

The Circuit Court order takes for granted Mr. Roach’s counsel’s representation that he cross-examined Yarborough on items (1) through (4) of Section 16-3-1700(A), which sets forth the requirements for Harassment in the 1st Degree.” However, the order even acknowledges that these elements are included under the statutory language stating, “Harassment in the first degree may include,

but is not limited to:” so this point, at best, can only show that the Magistrate Court or Yarborough were not relying on a showing of Harassment in the 1st Degree. Still further, on cross-examination, Mr. Rothstein only established that Yarborough had not discovered any physical evidence of recording devices, when in fact, she knew from reports through employees that he had stated he was “surveilling” Propel in June of 2019. (Transcript, March 9, 2020, at page 86, lines 8-16).

The Circuit Court order also states that “several items attached to the Complaint were not properly before the Court.” *Id.* at 3. Yet, no such items are specifically identified, and Appellant here would respectfully argue that such defects should have been addressed by a remand to the Magistrate Court, or a request for a supplemented Return, as provided for and referenced above under S.C. Code Ann. § 18-7-80.

The Circuit Court order also erroneously places or suggests a burden was placed on Mr. Roach, in stating, “it almost seems as though [Mr. Roach] had a presumption against him from the start and a very difficult burden to overcome.” His only burden was to show that there was no evidence to support a finding of Harassment in the 2nd Degree, and the order herein being appealed in no way addresses the abundance of evidence in the record that the Magistrate relied upon to make his findings, which included a “pattern of actions by the Defendant.” (Return at 1).

The Circuit Court’s order also states, “the Restraining Order applied to other individuals who were not parties to this action.” *Id.* at 3. However, the statute specifically provides for such protections. *See e.g.* S.C. Code Ann. § 16-3-1770

(stating, “The terms of the restraining order must protect the plaintiff and may include temporarily enjoining the defendant from: (1) abusing, threatening to abuse, or molesting the plaintiff or members of the plaintiff’s family.”).

Additionally, “Family” is a defined term in § 16-3-1700(E), to include “a spouse, child, parent, sibling, or a person who regularly resides in the same household as the targeted person.” *Id.*

Finally, the Circuit Court’s order twice refers to separate litigation pending in the district court, and in the second such reference states, “the Magistrate’s Court should not be used to gain some unfair advantage.” *Id.* at 4. This is also an improper consideration in evaluating the sufficiency of the evidence in the record to support the Magistrate’s finding of Harassment of Yarborough by Mr. Roach in his order dated March 9, 2020. To that end, S.C. Code Ann. § 16-3-1700, was amended in 2005, and can also be referred to as Mary Lynn’s Law. *Id.* at § 1700.

The Circuit Court order fails to comprehend the purpose of the subject statute, a/k/a Mary Lynn’s Law. Specifically, for example, Section 16-3-1735,³ which allows for a “law enforcement officer to sign a warrant in place of victim,” specifically and implicitly authorizes the Magistrate’s Court to consider hearsay evidence.

Likewise, Section 16-3-1810 notes the statute’s purpose to “protect the complainant,” as follows:

(A) The primary responsibility of a law enforcement officer when responding to a harassment in the first or second degree or stalking incident is to enforce the law and protect the complainant.

³ Section 16-3-1735 provides: “A law enforcement officer or another person with knowledge of the circumstances may sign a warrant in place of the victim for a person alleged to have committed a harassment or stalking offense as provided in Section 16-3-1710, 16-3-1720, or 16-3-1730.”

(B) The law enforcement officer shall notify the complainant of the right to initiate criminal proceedings and to seek a restraining order.

Id. (underline emphasis added).

The Circuit Court order further concludes that the “inability of [Mr. Roach or his counsel] to review the matter and have his attorney cross examine its author is highly prejudicial.” Id. at 3. However, not one item included in these papers is explained or set forth as to how it was prejudicial. In fact, a review of this material shows it was all cumulative to what was already in the record in the 74-page Dec. 5, 2019 Verified Complaint and Motion for Restraining Order filed in the Magistrate Court. Further, the specific statutory provisions providing, for example, for *ex parte* orders without notice to defendant (Id. at Section 1760), third-party warrant signing by a “law enforcement officer or another person with knowledge of the circumstances,” (Id. at Section 1735), and “protect the complainant,” (Id. at Section 1810), show that this information provided under exigent circumstances was proper in view of the subject matter at issue.

CONCLUSION

For at least the reasons set forth herein, Yarborough respectfully requests that the order of the Magistrate Court be re-instated and this remanded to the Magistrate Court for consideration of a permanent restraining order.

[signature on next page]

Respectfully submitted,

s/ Wesley D. Few/



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ATTORNEYS FOR APPELLANT LEE C.
YABOROUGH

Greenville, South Carolina
December 7, 2020

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

Perry H. Gravely, Thirteenth Circuit Judge

Appellate Case No. 2020-001182

Lee C. Yarborough,

Appellant,

v.

Sean Eric Roach,

Respondent.

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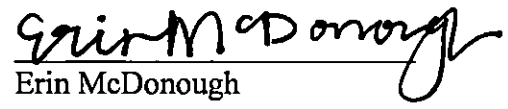
The undersigned hereby certifies that on December 7, 2020 and then again on December 15, 2020, the **Appellant Lee C. Yarborough's Yarborough's Initial Brief and Designation of Matter to be Included in the Record on Appeal** were served on all counsel of record and the Court of Appeals Clerk of Court via U.S. Mail, as follows:

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

David E. Rothstein, Esq.
1312 Augusta Street
Greenville, SC 29605

ATTORNEYS FOR RESPONDENT SEAN ERIC ROACH

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Erin McDonough

December 15, 2020
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December 15, 2020

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SC Court of Appeals

Via U.S. Mail

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

RE: Sean Eric Roach, Respondent v. Lee C. Yarborough, Appellant,
Of whom Lee C. Yarborough is the Appellant
Appellate Case No: 2020-001182
Case No.: 6:19-cv-03546-HMH
Our File No.: 00280-002

Dear Clerk of Court,

Enclosed for filing is the Appellant Lee C. Yarborough's Initial Brief and Designation of Matter in the above referenced case, to be included in the Record on Appeal, along with the certificate of service for the same. The original package was mistakenly mailed on December 7, 2020 to Judge Gravely at Post Office Box 219, Pickens, SC 29671, who was kind enough to email and make us aware of the error. Please return a file stamped copy for our files in the return addressed envelope also enclosed.

With warm regards, I remain

Very Truly Yours,



Wesley D. Few

WDF/ekm

Enclosures

CC: David E. Rothstein, Esq. (*via U.S. Mail*)
Greenville County Court of Common Pleas (*via e-file*)
Client (*via Email only*)

WESL
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