

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Williamsburg County
Michael G. Nettles, Circuit Court Judge

RECEIVED

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S.C. SUPREME COURT

THE STATE,

PETITIONER,

V.

RONALD HAKEEM MACK,

RESPONDENT

APPELLATE CASE NO. 2020-001101

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the Court of Appeals err by expanding the jurisdiction of appellate courts beyond the limitations specifically set by the South Carolina General Assembly in section 14-3-330 of the South Carolina Code, through its misinterpretation of this Court's precedent to allow the state to proceed with an interlocutory appeal of a circuit court's decision to grant a new sentencing proceeding?

STATEMENT

Seventeen-year-old Ronald Mack, along with his mother, her boyfriend, and another juvenile, shot and killed Mack's former friend. R. 34-36. In 2010, Mack entered a guilty plea to murder and burglary. Mack was represented by LeGrand Carraway, and the state was represented by Kimberly Barr. R. 1. The Honorable Clifton Newman sentenced Mack to fifty years in prison for murder. R. 30-32; R. 37-38. Under South Carolina law, Mack must serve every day of his fifty-year sentence and may not be released on parole. See S.C. Code Ann. § 16-3-20; S.C. Code Ann. § 24-13-100.

On April 20, 2015, Mack filed a motion for resentencing, arguing his fifty-year sentence was the functional equivalent of a life without parole ("LWOP") sentence such that he was eligible for resentencing under Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). R. 40-42; R. 43-61. The solicitor filed a motion to dismiss on October 5, 2016. R. 85; R. 88. On February 17, 2017, the Honorable Michael G. Nettles convened a hearing on the state's motion. R. 117. The state was represented by Solicitor Ernest A. Finney, III, and Mack was represented by Laura Baer. R. 117. Thereafter, on June 16, 2017, Judge Nettles filed an order denying the state's motion to dismiss. R. 368-401. Further, Judge Nettles found (1) that Aiken was applicable to defendants sentenced to a term of years that constitutes the functional equivalent of LWOP; (2) that Mack's fifty-year sentence constituted a de facto life sentence such that his motion for resentencing pursuant to Aiken was proper; and (3) that Mack's original sentencing hearing did not comply with the constitutional requirements of the Eighth Amendment as interpreted by the United States Supreme Court and the South Carolina Supreme Court. R. 368-401. Accordingly, he ruled that Mack was entitled to a resentencing hearing. R. 368-401.

The state filed a notice of appeal, which Mack moved to dismiss as an improper interlocutory appeal on December 19, 2017. The state opposed the motion by return filed January 2, 2018. The motion to dismiss the appeal was denied by an order filed February 1, 2018. Thereafter, the parties filed their respective briefs. On May 20, 2020, the Court of Appeals entertained the state's interlocutory appeal in this matter and reversed the circuit court's grant of a new sentencing hearing. State v. Mack, 2020-UP-148 (S.C. Ct. App. filed May 20, 2020); App. 1-3. Mack requested rehearing, which was denied by an order filed July 14, 2020. App. 4-27. Thereafter, Mack filed a petition for writ of certiorari raising two issues. On August 6, 2021, this Court granted the petition as to one question regarding the interlocutory nature of the state's appeal and the Court of Appeals' decision extension of the appellate courts' jurisdiction. This brief of petitioner follows.

STANDARD OF REVIEW

“In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown.” State v. Laney, 367 S.C. 639, 643, 627 S.E.2d 726, 729 (2006). The appellate courts of South Carolina “review questions of law de novo, with no deference to trial courts.” Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018). An abuse of discretion occurs when the court’s decision is unsupported by the evidence or controlled by an error of law. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012).

ARGUMENT

Expanding the jurisdiction of appellate courts beyond the limitations specifically set by the South Carolina General Assembly in section 14-3-330 of the South Carolina Code, the Court of Appeals misinterpreted this Court's precedent to allow the state to proceed with an interlocutory appeal of a circuit court's decision to grant a new sentencing proceeding.

The Court of Appeals held Petitioner's argument that the circuit court's order was not immediately appealable was "without merit." State v. Mack, 2020-UP-148 (S.C. Ct. App. filed May 20, 2020); App. 2. According to the Court of Appeals, the appellate court must examine the merits of the appeal in order to decide whether the appeal may proceed, and if the review of the merits uncovers an error of law, then the bar to interlocutory appeals no longer exists. State v. Mack, 2020-UP-148 (S.C. Ct. App. filed May 20, 2020); App. 2. To support this contention, the Court of Appeals cited this Court's decision in State v. Johnson, 376 S.C. 8, 654 S.E.2d 835 (2007). In doing so, the Court of Appeals misconstrued this Court's precedent and greatly expanded appellate jurisdiction beyond the limitations placed by the General Assembly and this Court's precedent.

The South Carolina Constitution vests this Court with appellate jurisdiction in cases of equity and under such laws as the General Assembly may prescribe. S.C. Const. Art. V, § 5. Under section 14-3-330 of the South Carolina Code, this Court shall have appellate jurisdiction for correction of errors of law in law cases, and the following types of judgments, decrees, and orders:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review

any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial[,] or (c) strikes out an answer or any part thereof or any pleading in any action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330.

The most common avenue for a party to invoke the jurisdiction of the appellate courts is through a final judgment. See Rule 201(a), SCACR (“Appeal may be taken, as provided by law, from any final judgment, appealable order or decision). “An appeal ordinarily may be pursued only after a party has obtained a final judgment.” State v. Wilson, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010). “A fundamental rule of appellate procedure is that a judgment or order must usually be final before it can be appealed.” Doe v. Howe, 362 S.C. 212, 216, 607 S.E.2d 354, 355 (Ct. App. 2004). “‘Final judgment’ is a term of art referring to the disposition of all the issues in the case.” Id. at 216, 607 S.E.2d at 356. “A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.” State v. Looper, 421 S.C. 384, 388, 807 S.E.2d 203, 205 (2017) (internal quotation omitted). “The final judgment rule serves the laudatory goal of preventing piecemeal review of matters that are merely steps toward a final judgment.” Doe, 362 S.C. at 216, 607 S.E.2d at 356. “It is a bad practice, and generally condemned, to hear appeals by piecemeal, especially in criminal cases; for it is destructive of the prompt administration of justice, which is so essential to the peace of society.” State v. Burbage,

51 S.C. 284, 28 S.E. 937 (1898). Doing so “leads to an unnecessary consumption of the time of [the appellate courts], which could be much better employed than in considering or determining questions which may never become of any practical importance in a given case.” Id. For example, “[i]f the defendant should be acquitted, then, of course, all the questions presented” by the appeal “would lose all practical importance, and their consideration would become a work of supererogation.” Id. “If, on the other hand, he should be convicted, [then] all these questions could be raised on appeal from the final judgment.” Id.

In State v. Byars, 79 S.C. 174, 60 S.E. 448 (1908), the state appealed the trial court’s grant of a new trial to the defendant. This Court held:

[W]e feel ourselves unable at this time to entertain a consideration of the questions now presented. This court is confined to a consideration of questions presented after a final judgment has been rendered. This is no new question to this court, for we have held that a final judgment is essential in the hearing of an appeal. The prisoner has never been sentenced. The sentence is a final judgment.

Byars, 79 S.C. at 174, 60 S.E. at 448. See Rule 203(b)(2), SCACR (stating the time for serving a notice of appeal is ten days after the *sentence* is imposed). More recently, this Court explained that “in the criminal context, a judgment is final when sentence is imposed.” Looper, 421 S.C. at 390, 807 S.E.2d at 206. See also Major v. S.C. Dept. of Probation, Parole, and Pardon Services, 384 S.C. 457, 465-466, 682 S.E.2d 795, 799-800 (2009) (“[A] court’s final judgment in a criminal case is the pronouncement of the sentence which includes the ability to designate whether sentences run concurrent or consecutive, subject to statutory restrictions”); State v. Robinson, 287 S.C. 173, 173, 337 S.E.2d 204, 204 (1985) (explaining “[j]udgment in a criminal case is not final until sentence is imposed” and not permitting an appeal where a sealed sentence had not been unsealed); State v. Hubbard, 277 S.C. 568, 569, 290 S.E.2d 817, 817 (1982) (dismissing an appeal from the denial of a motion to suppress evidence); Ex parte Murray, 261

S.C. 255, 256, 199 S.E.2d 718, 719 (1973) (“To create finality in criminal cases for purpose of appeal, it is necessary that conviction should be followed by sentence”); State v. McMillan, 189 S.C. 444, 444, 1 S.E.2d 626, 627 (1939) (holding a defendant could not appeal immediately from the denial of a motion to quash because he could raise the issue after final judgment); State v. Hightower, 33 S.C. 598, 11 S.E. 579 (1890) (dismissing an appeal as premature where a sentence had not been imposed).

In the instant case, the denials of the prosecution’s motion to dismiss and subsequent motion to reconsider do not constitute a final order.¹ The effect of Judge Nettles’ ruling is to provide Mack with a new sentencing hearing. Mack’s resentencing hearing has not yet been held and no new sentence has been imposed such that his case has not been determined with finality. Thus, until resentencing occurs, there has not been a final judgment and is not appealable under subsection (1) of S.C. Code Ann. § 14-3-330. See also State v. Rearick, 417 S.C. 391, 400, 790 S.E.2d 192, 197 (2016) (refusing to permit a defendant to appeal a denial of a motion to dismiss based on double jeopardy grounds and re-affirming a prior holding that a defendant must be sentenced in order for an appeal to proceed); State v. Miller, 289 S.C. 426, 426-427, 346 S.E.2d

¹ While the opinion has no precedential value because it is unpublished, the Court of Appeals recently dismissed a state’s appeal as interlocutory where the defendant had not been sentenced. State v. Summersett, 2016-UP-293 (S.C. Ct. App. filed June 15, 2016). The trial court vacated Summersett’s life without parole sentence and ordered a new sentencing hearing. Id. The state appealed. Id. The Court of Appeals first noted there was no final judgment because no sentence had been imposed. Id. Next, the Court of Appeals addressed section 14-3-330 of the South Carolina Code. Id. The Court held the order at issue “was not entered in a special proceeding (subsection 3), does not involve an injunction or receiver in the court of common pleas (subsection 4), and does not grant or refuse a new trial or strike a pleading (subsections 2b and 2c).” Id. Finally, the Court held the order did not involve the merits or affect a substantial right that effectively determines the action and prevents a judgment from which an appeal might be taken. Id. Again, this case is not offered for precedential value, but simply to alert this Court as to how the Court of Appeals has handled similar appeals.

705, 705-706 (1986) (dismissing an appeal from the denial of a motion to bar capital sentencing on double jeopardy grounds).

In light of the final judgment rule's purpose of preventing piecemeal appeals, "exceptions" to the final judgment rule "should be recognized cautiously." Doe, 362 S.C. at 216, 607 S.E.2d at 356. "An interlocutory order not governed by a specialized appealability statute is not immediately appealable unless it fits into one of the categories listed in section 14-3-330 of the South Carolina Code (1976 & Supp. 2009)." Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 300, 705 S.E.2d 475, 477 (Ct. App. 2011) (citing Ex Parte Capital U-Drive-It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006)). To prevent piecemeal appellate review, the statutory exceptions to the jurisdiction of the appellate courts must be strictly construed. Wilson, 387 S.C. at 601, 693 S.E.2d at 925; Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) ("The provisions of section 14-3-330 have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed.").

Here, the order denying the state's motion to dismiss the motion for resentencing was not entered in a special proceeding (subsection 3), does not involve an injunction or a receiver in the court of common pleas (subsection 4), and does not grant or refuse a new trial or strike a pleading (subsections 2(b) and 2(c)). Thus, the question is whether the order involves the merits (subsection 1) or affects a substantial right and effectively determines the action and prevents a judgment from which an appeal might be taken (subsection (2)(a)).

An interlocutory order is immediately appealable under subsection (1) if it "involves the merits." "An order 'involves the merits,' ... and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense." Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006). "The

phrase ‘involving the merits’ is narrowly construed in modern precedent.” Id. “An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties’ rights.” Id. at 7, 630 S.E.2d at 467-68.

Here, the judge’s denial of the motion to dismiss failed to finally determine some substantial matter in the case. Rather, the judge simply vacated Mack’s sentence and found he was entitled to a new sentencing hearing. The judge’s decision is not final as the state may challenge it on appeal *after* a new sentence has been imposed. Additionally, there is “some further act that must be done by the trial court prior to a determination of the parties’ rights.” That “further act” is sentencing of Mack.

An interlocutory order is immediately appealable under subsection (2)(a) if it affects a substantial right and the appellant cannot seek review of the current order in an appeal from the final judgment. Peterkin v. Brigman, 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995). Applying this subsection, the Court of Appeals held the state may directly appeal an order prohibiting the state from withdrawing a plea offer. Reed v. Becka, 333 S.C. 676, 681, 511 S.E.2d 396, 399 (Ct. App. 1999). The court reasoned that not permitting the state to withdraw a plea offer significantly impaired the prosecution of a case because jeopardy attaches as soon as a court accepts a defendant’s guilty plea. Id. On the other hand, in civil cases, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised at a later stage of the proceedings; therefore, the denial of a motion to dismiss is not immediately appealable. McLendon v. S.C. Dep’t. of Highways and Pub. Transp., 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994). Here, the judge denied the state’s motion to dismiss, and just like in

a civil case, the denial of such a motion does not establish the law of the case, and the issue raised in the motion can be raised on appeal later.

Although this Court did not specify which exception applied, this Court appeared to analyze the issue presented in State v. Johnson, 376 S.C. 8, 654 S.E.2d 835 (2007) under subsection 2(a). Johnson was convicted of murder based largely on the testimony of his four co-defendants. State v. Johnson, 376 S.C. 8, 10, 654 S.E.2d 835, 836 (2007). One co-defendant mentioned a polygraph test. Id. Johnson moved for a mistrial, which was denied. Id. After the jury found him guilty, he moved for a new trial based upon the reference to a polygraph test. Id. The trial judge granted Johnson a new trial. Id. Thereafter, the state appealed the grant of a new trial. Id. This Court explained, “[t]he state may only appeal a new *trial* order if, in granting it, the trial judge committed an error of law.” Id. (emphasis added). Thereafter, this Court stated, “When determining whether an error of law exists, and therefore whether the state has a right to an appeal, it is necessary to consider the merits of the case.” Id. Ultimately, this Court held the state had no right to appeal because there was no error of law as the trial judge did not abuse his discretion in granting the new trial based upon the evidence presented. Id. See also State v. Dean, 427 S.C. 92, 106-107, 828 S.E.2d 243, 250-251 (Ct. App. 2019) (dismissing a state’s appeal where the judge committed no error in granting a new trial based upon the state failing to disclose plea negotiations with a witness); State v. Smith, 383 S.C. 159, 169, 679 S.E.2d 176, 181-182 (2009) (dismissing a state’s appeal where the trial judge did not commit an error of law in granting a new trial); State v. Dicapua, 383 S.C. 394, 398, 680 S.E.2d 292, 294 (2009) (holding the state could immediately appeal the grant of a new *trial* to a defendant where an error of law occurred).

By using the holding in Johnson to permit the state to appeal Judge Nettles' order granting Mack a new *sentencing* proceeding, the Court of Appeals misapplied the legal rule pronounced in Johnson. When this Court concluded it must review the merits of a case in order to determine whether the state's right to appeal was invoked properly, this Court specifically limited the state's right to appeal and the review of the merits to grants of new *trials*. Such a limitation makes sense in light of the qualitative differences between the grant of a new trial and the grant of a new sentencing proceeding. When a judge grants a defendant a new trial, the judge overturns a jury's verdict, which may involve an invasion on the province of powers restricted to the jury. See State v. Dasher, 278 S.C. 395, 399-400, 297 S.E.2d 414, 416 (1982) (explaining that trial judges may not "invade the area where the jury system has deemed most effective – that is, in assessing the truthfulness of fellow human beings testifying under oath"). However, when a judge grants a new sentencing proceeding, the judge alters a matter that was always only within the judge's discretion.

Here, no substantial right of the state is affected and the state is not precluded from raising the issue on appeal after final sentencing. In fact, not only could the state appeal the order granting resentencing after the resentencing actually occurs, the state may decide not to appeal after a sentencing proceeding as the state may be completely satisfied by the sentence imposed. "The court does not concern itself with moot or speculative questions." Berry v. Zahler, 220 S.C. 86, 87, 66 S.E.2d 459, 460 (1951). Thus, the order is not immediately appealable under subsection (2)(a).

With no final judgment and no other statutory provision authorizing this appeal, our strict appealability laws necessitate dismissal of the state's improper interlocutory appeal. The Court of Appeals erred in addressing the merits of the state's appeal and misinterpreted this Court's

opinion in Johnson, supra, in doing so. Petitioner respectfully requests this Court correct the Court of Appeals' misinterpretation of this Court's precedent to make clear the limitations placed by the legislature on appellate jurisdiction remain in place. The state's appeal should be dismissed as an improper interlocutory appeal. Allowing the state to go forward with this appeal is exactly the piece-meal review that our strict appealability rules are meant to prevent.

CONCLUSION

Petitioner respectfully requests this Court dismiss the state's appeal and remand for a new sentencing hearing for Petitioner.

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of September, 2021.