

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2011-CP-10-3207

City of Charleston,

Respondent,

v.

Jacob A. Stone,

Petitioner.

RETURN TO APPELLANT'S MOTIONS

FOR REHEARING & TO REINSTATE APPEAL

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APR 23 2013

SC Court of Appeals

MARK J. BOURDON
Chief Prosecutor for the City of
Charleston

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COUNSEL FOR RESPONDENT

OTHER COUNSEL OF RECORD:

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COUNSEL FOR APPELLANT

STATEMENT OF THE CASE

Appellant was issued a Uniform Traffic Ticket for driving under the influence. Without the case being even called for trial, the municipal court erroneously processed Appellant's ticket as a conviction from a trial in absence. When this was discovered, Appellant moved for an order vacating the conviction and Respondent consented. Thereafter, Appellant moved to have the DUI ticket dismissed on Double Jeopardy grounds – that jeopardy had attached and that he would be subject to multiple, subsequent punishment for the same act if the prosecution were allowed to continue. Over Respondent's objection, the motion was granted by the municipal court.

Respondent appealed the dismissal to circuit court and a hearing was held. Finding that Double Jeopardy had not attached, because there had neither a first prosecution nor a conviction in this case, and that, regardless, the administrative consequences suffered by Appellant were not sufficient for Double Jeopardy to attach, the circuit court reversed the municipal court dismissing the DUI ticket and remanded the case.

Appellant thereafter appealed the decision of the circuit court to this Court. The Respondent moved to dismiss the appeal on the ground that the order of the circuit court reversing the municipal judge's double jeopardy ruling and remanding the case for trial was not immediately appealable by Appellant. Respondent's motion to dismiss was granted by this Court on January 9, 2013. Appellant petitions this court for rehearing, rehearing en banc, and moves to reinstate appeal.

ARGUMENT

To the extent that the Appellant petitions this Court for rehearing pursuant to Rule 221 SCACR, Respondent submits that this Court properly dismissed Appellant's appeal as premature,

and in doing so correctly interpreted and applied the applicable legal authority. Pursuant to Rule 221 (a) this Court should not consider rehearing this matter as it did not overlook or misapprehend a point of law. Under 221 (c) it appears that the Court will not entertain motions for rehearing given the nature of this appeal as it is premature. Since the Court was correct in its ruling of January 9, 2013, it should not under Rule 219 (a), hear this matter en banc as it not necessary to maintain uniformity in decisions nor does it involve a question of exceptional importance.

(I)

The Court of Appeals correctly held that a criminal defendant may not appeal from a summary court proceeding until a final judgment has been rendered, *i.e.*, he is convicted and sentence is imposed. *See State v. Gregorie*, 339 S.C. 2, 528 S.E.2d 77 (2000); *Parsons v. State*, 289 S.C. 542, 347 S.E.2d 504 (1986) and *State v. Robinson*, 287 S.C. 173. Moreover, “an order denying a double jeopardy claim is not immediately appealable.” *State v. Miller*, 289 S.C. 426, 427, 346 S.E.2d 705, 706 (1986), cited in *State v. Gregorie*, 339 S.C. at 4, n. 1, 528 S.E.2d. at 78, n.1.

Appellant’s case has not yet proceeded to trial, and he has not been convicted and sentenced due to Appellant’s appeal of the circuit court order. Therefore, there is no final judgment from which Appellant may appeal at this time and this appeal is premature. As such, the Court of Appeals rightly granted Respondent’s Motion to Dismiss.

(II)

The appellate courts of this state have interpreted S.C. Code Section 14-3-330 to allow for the prosecution to appeal pre-trial rulings suppressing evidence which either significantly impair or prevent the prosecution of a criminal case, see, *e.g.*, *State v. Sterling*, 377 S.C. 475, 661

S.E.2d 99 (2008); *State v. McKnight*, 287 S.C. 167, 337 S.E.2d 208 (1985); *State v. Mabe*, 306 S.C. 355, 412 S.E.2d 386 (1991), and those which result in pre-trial amendment or dismissal of charges. *See, e.g., State v. Myers*, 313 S.C. 391, 438 S.E.2d 236 (1993); *State v. Ridge*, 269 S.C. 61, 236 S.E.2d 401 (1977); *State v. Lynn*, 120 S.C. 258, 113 S.E. 74 (1922); *State v. Belviso*, 360 S.C. 112, 600 S.E.2d 68 (Ct. App. 2004). Respondent was able to appeal the order of the municipal court to the circuit court because the order prevented the prosecution of the case by dismissing the traffic ticket on double jeopardy grounds.

(III)

Appellant opposes dismissal and attempts to use *State v. Gregorie* to argue that any aggrieved party may appeal from the appellate ruling of a circuit court to this Court and that dismissal of his appeal conflicts with the ruling in *Gregorie*. The Respondent submits that the Appellant misconstrues *Gregorie*. The distinction between this appeal is that the defendant in *Gregorie* had been convicted and sentenced in the magistrate's court before the appeal was pursued to the circuit court and therefore the appeal was from a final judgment in a criminal case. There was a final verdict with the Court of Appeals affirming the circuit court's remand ruling. In contrast, the case at hand has had no final judgment in the municipal/trial court. The defendant has not been convicted so there is no final judgment from which the Appellant may appeal at this time. Therefore, this Court correct relied upon the rule that a criminal defendant may not take appeal from a ruling of the trial court until he has been convicted and the trial court imposes a final sentence. *See State v. Robinson*, 287 S.C. 173, 337 S.E.2d 204 (1985).

(IV)

Furthermore, even in construing *Gregorie* and 18-1-30 in the manner as Appellant puts forth, Appellant may not appeal because he is not an aggrieved party, despite the contention that he is

aggrieved by the circuit court ruling. Appellate review is limited to parties aggrieved by a judgment, order or sentence of the trial court. *State v Cox*, 328 S.C. 371, 492 S.E. 2d 399 (1997). Appellant is seeking review by this Court of a ruling so that he may avoid trial. Avoidance of trial is not a substantial right entitling a party to an immediate appeal of an intermediate order. *Sheilds v. Martin Marietta Corp.*, 303 S.C. 469,402 S.E.2d. 482 (1991). Respondent submits that Appellant must proceed to trial, and thereafter present the issue on appeal to this Court if he is convicted and sentenced.

(V)

Respondent further submits that any new facts and arguments presented in Appellant's Motion to Reinstate cannot be considered by this Court at this time. A request for a rehearing must show points purportedly overlooked or misapprehended by the Court. The purpose is not to allow Appellant to present point that he overlooked or failed to argue to the Court before the appeal was dismissed. *Arnold v. Carolina Power and Light Co.*, 168 S.C.163, 167 S.E. 2d 234 (1933).

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the undersigned respectfully requests this Court deny Appellant's petition for rehearing, petition for rehearing en banc and motion to reinstate appeal; sustain its previous order to dismiss in the above-captioned appeal; and for such other and further relief as this Court may deem just and proper.

Respectfully Submitted,

MARK J. BOURDON
Chief Prosecutor for the City of Charleston
Bar No 65265

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Charleston, South Carolina 29403

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BY: 
COUNSEL FOR RESPONDENT

Charleston, South Carolina

April 19, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2011-CP-10-3207
COA Tracking No. 2012-21-0727

City of Charleston.....Respondent,

v.

Jacob A. Stone,.....Appellant.

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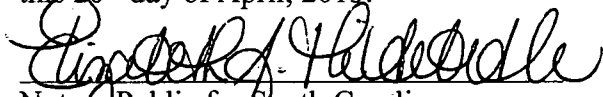
SC Court of Appeals

The undersigned certifies that a copy of the Respondent's Return to the Appellant's Motion to Reinstate has been served upon the following, by mailing a copy, properly addressed with sufficient postage affixed thereto, this 20th day of April, 2013:

Thomas J. Rhode
15 Prioleau Street
Post Office Box 1002
Charleston, SC 29402


Mark J. Bourdon

SWORN to and SUBSCRIBED before me
this 20th day of April, 2013.


Notary Public for South Carolina

Mt Commission Expires: 1/23/23

Joseph P. Riley, Jr.
Mayor



City of Charleston
South Carolina
Office of the Prosecutor

Mark J. Bourdon
Chief Prosecutor
Phone (843) 965-4148
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Melinda A. Lucka
Prosecutor
Phone (843) 720-3026
Fax (843) 577-5135

April 20, 2013

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

Re: City of Charleston v. Jacob A. Stone

Dear Ms. Kitchings:

Enclosed for filing please find the original and six (6) copies of the Respondent's Return to the Appellant's Motion to Reinstate in the above-referenced appeal. I have also enclosed the original Proof of Service indicating service of the Motion on today's date.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,

Mark J. Bourdon
Chief Prosecutor

Enclosures (as stated)

MJB/eah

cc: Thomas J. Rode, Counsel for Appellant

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