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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 22021-001527

Tina Patton,

Appellant,

v.

Linda Doty, Respondent.

INITIAL BRIEF OF APPELLANT

Appellant, Ms. Tina Patton, by and through her counsel, Thornwell Simons, respectfully moves before this Court to reverse the Court below's decision affirming her Richland County Magistrate Court conviction for Contempt of Court, for the following reasons:

1. The Trial Court lacked subject matter jurisdiction to hear the case in the absence of an arrest.

2. The Trial Court committed an error of law and/or abused its discretion in allowing a criminal trial to take place in the absence of an appropriate prosecuting authority.

3. The Trial Court committed an error of law and/or abused its discretion in allowing a criminal trial to take place when Defendant had been provided with no adequate notice of the charges against her and no discovery at all prior to the date of trial.

4. The Trial Court committed an error of law and/or abused its discretion in refusing Defendant's request for a jury trial.

BACKGROUND

Appellant / Defendant Ms. Tina Patton and Plaintiff / Respondent Ms. Linda Doty have been next-door neighbors for many years. On February 24, 2014, Ms. Patton first called the police to report an allegation of criminal harassment against her by Ms. Doty, alleging (according to the incident report) that Ms. Doty had, over the three years prior to that, repeatedly yelled at Ms. Patton across the property line, alleging "off the wall nonsense" such as that Ms. Patton used drugs, and insulting Ms. Patton's children in various ways. (Record, at 75)[1]. On October 14, 2014, Ms. Tina Patton again called the police to report hostile behavior against her by Ms. Doty. (R, 74). The incident report characterized the matter as "a civil dispute." *Id.* Three years later, on February 9, 2017, Ms. Linda Doty contacted law enforcement alleging that Ms. Patton had appeared naked in Ms. Doty's front yard and yelled threats at her. (R, 73) The responding officer's incident report noted this allegation for "documentation purposes only" and did not confirm the allegation in any way. (R, 73). Subsequently, on March 3, 2017, Ms. Tina Patton again called the police to complain of harassment against her by Ms. Linda Doty. (R, 71).

When calls to the police were unable to resolve the issue, Ms. Patton filed *pro se* for a restraining order against Ms. Doty on April 29 2019. (R, pg. 66), alleging harassment, specifically repeated calls by Ms. Doty to Ms. Patton's landlord and continual photographing of her residence. *Id.* Ms. Linda Doty, by and through retained counsel, filed and served an Answer and Counterclaim requesting restraining order against Defendant (Patton) on May 6, 2019. (R. 79-83). A hearing on both matters was held on May 29, 2019. (R, 84). At that hearing, Judge Coble denied Ms. Patton's request for a restraining order against Ms. Doty, and granted Ms. Doty's

[1] The Record filed by the Court below did not enumerate the pages, so page cites are by Appellant Counsel's own count.

request for a restraining order against Ms. Patton. Plaintiff Doty subsequently filed a Rule to Show Cause on October 24, 2019, alleging violations of the May 29 restraining order.

A rule to show cause hearing was scheduled on January 6, 2020 in front of Judge Coble. (R, 91). At that time, Defendant was screened and approved for a public defender and the matter was continued. The rescheduled show cause hearing was held on February 19, 2020. (Transcript, at 1)[2]. Ms. Patton was represented by Thornwell Simons of the Richland County Public Defender's Office, and Ms. Doty was represented by Charnell Peake of Peake & Fowler. (T, 2).

From the face of the Complaint filed by Ms. Doty, it was unclear whether Ms. Doty was seeking to have Ms. Patton penalized either civilly or criminally for those alleged violations. (R, 9). The trial judge granted that civil contempt was not at issue, as there was no ongoing conduct which could be civilly enjoined. (T, 47-49; R, 16-19). "The distinguishing factor [of civil contempt is that] the contemnor may avoid or cut short the incarceration by complying with the court's directive." *Dimarco v. Dimarco*, 393 S.C. 604, 713 S.E.2d 631 (S.C. 2011). Ms. Patton was in compliance with the Court's Order as of the trial date, so civil contempt was inappropriate. (T, 47-49; R, 16-19).

The only remaining issue, then, as of the trial date, was criminal contempt. Defendant moved to dismiss, both orally and in writing, on several grounds; most importantly, Defendant objected to Mr. Peake's standing to prosecute a criminal contempt claim and to the total failure to provide any pre-trial discovery at all to defense counsel. (T, 5-12; R, 16-19). Defendant's motions were denied. (T, 12). Defense counsel also requested a jury trial on Ms. Doty's behalf. (T, 12; R, 17). This request was also denied, and the matter proceeded to a bench trial. (T, 12). At that trial, Judge Coble did not issue specific findings as to how Ms. Patton had specifically violated the

[2] The Record on Appeal did not include a transcript, but only a recording. Plaintiff's Counsel has prepared and attached a transcript for the Court's benefit.

restraining order, but held Ms. Patton was guilty of contempt of court for violating the May 29, 2019 restraining order and sentenced her to 30 days, suspended upon payment of a $500 fine. (T, 49, 54). A Notice of Appeal was properly and timely filed and served on all parties on or before February 28, 2020. A Hearing on the appeal was first scheduled doe December 11, 2020, but was continued due to the ongoing coronavirus crisis. The hearing was rescheduled for January 29, 2021, but that date was also rescheduled as Appellant's counsel had a mandatory training at that date and time. The matter was heard at oral argument before Circuit Court Judge Jocelyn Newman on August 27th , 2021. At that time the matter was taken under advisement and no findings or rulings were issued. A form ruling of "Affirmed" was issued by the Circuit Court on December 9, 2021. This appeal follows.

STANDARD OF REVIEW

An appellate court should reverse a decision regarding contempt "only if it is without evidentiary support or the trial judge has abused his discretion." *Durlach v. Durlach*, 359 S.C. 64, 70, 596 S.E.2d 908, 912 (2004) (quoting *Stone v. Reddix-Smalls*, 295 S.C. 514, 516, 369 S.E.2d 840 (1988)); see also *Henderson v. Henderson*, 298 S.C. 190, 197, 379 S.E.2d 125, 129 (1989) ("A finding of contempt rests within the sound discretion of the trial judge."). "An abuse of discretion occurs either when the court is controlled by some error of law or where the order, based upon findings of fact, lacks evidentiary support." *Townsend v. Townsend*, 356 S.C. 70, 73, 587 S.E.2d 118, 119 (Ct.App.2003). *Miller v. Miller*, 652 S.E.2d 754, 375 S.C. 443 (S.C. App. 2007).

QUESTIONS PRESENTED AND ANALYSIS

I. DID THE TRIAL COURT HAVE SUBJECT MATTER JURISDICTION, IN THE ABSENCE OF AN ARREST, OVER ALLEGED CONTEMPT OUTSIDE THE PRESENCE OF THE COURT?

The trial court lacked subject matter jurisdiction to hear this criminal charge as the alleged contempt did not take place in the presence of the Court and Ms. Patton was never arrested and charged with an offense.

The Court below relied upon two sources of authority for its contempt finding: *Curlee v. Howle*, 277 S.C. 377, 287 S.E.2d 915 (S.C. 1982), and South Carolina Code §22-3-950. (T, 8). *Curlee* is inapposite, firstly because it is a Family Court case and the Family Courts have specific and broad jurisdictional authority to punish both direct and indirect contempt under S.C. Code 63-3-530 (A)(19) and (22) which magistrate courts do not have, but more importantly because *Curlee* is specifically a case about civil, not criminal, contempt ("The conditional nature of the imprisonment, based entirely upon appellant's refusal to pay respondent's expenses, justified holding the civil contempt proceeding without a jury trial.") *Id.* The trial court never found Ms. Patton guilty of civil contempt, only criminal contempt. (T, 49) Civil and criminal contempt implicate different rights and operate according to different standards. "The distinction between civil and criminal contempt is critical, because criminal contempt triggers additional constitutional safeguards." *Miller v. Miller*, 652 S.E.2d 754, 375 S.C. 443 (S.C. App. 2007)

As to the Court's holding that it had statutory authority under South Carolina Code §22-3-950, "Power to punish for contempt," that code section states, in pertinent part:

> "Every magistrate shall have power to enforce the observance of decorum in his court while holding the same and for that purpose he may punish for contempt any person who, in the presence of the court, shall offer an insult to the magistrate or a juror or who is wilfully guilty of an undue disturbance of the proceedings before the magistrate while sitting officially."

S.C. Code §22-3-950 (2019). This statutory provision grants South Carolina magistrate judges jurisdiction over direct contempt which takes place *"in the presence of the Court."* It grants no jurisdiction *outside* that presence.

Direct contempt involves contemptuous conduct in the presence of the court. *State v. Kennerly*, 337 S.C. 617, 620, 524 S.E.2d 837, 838 (1999). A person may be found guilty of criminal direct contempt if the conduct interferes with judicial proceedings, exhibits disrespect for the court, or hampers the parties or witnesses. *State v. Havelka*, 285 S.C. 388, 389, 330 S.E.2d 288 (1985). Direct contempt that occurs in the court's presence may be immediately adjudged and sanctioned summarily. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994); S.C.Code Ann. § 14-5-320 (1976). In *State v. Harper*, 297 S.C. 257, 258, 376 S.E.2d 272 (1989), the S.C. Supreme Court determined that "(c)ontempt is an extreme measure and the power to adjudge in contempt is not to be lightly asserted", citing §22-3-950 as a magistrate's authority to punish for contempt. *See also Dean v. Shirer*, 547 F.2d 227, 230 (4th Cir. 1976) (citing §22-3-950 as the contempt authority for magistrate's courts and stating "(t)he contempt power under the South Carolina statute is thus limited to instances where the contempt is committed in the presence of the court, or where the party is wilfully guilty of an undue disturbance of the proceedings before the magistrate while sitting officially"). *See generally* "Opinion regarding a magistrate's general contempt authority[,]" South Carolina Office of the Attorney General, March 1, 2013. Furthermore, "South Carolina courts have always taken a liberal and expansive view of the `presence' and `court' requirements." *Kennerly*, 337 S.C. at 620, 524 S.E.2d at 838 (1999). The "presence of the court" extends beyond the mere physical presence of the judge or the courtroom to encompass all elements of the system. *Id.* For example, depositions have been ruled judicial proceedings and are within the "presence of the court." *Matter of Golden*,

329 S.C. 335, 496 S.E.2d 619 (1998).

Here, however, the alleged violation was one of *indirect* or "constructive" contempt, totally outside the presence of the Court. "'Constructive contempt is contemptuous conduct occurring outside the presence of the court." *Miller v. Miller*, 652 S.E.2d 754, 375 S.C. 443 (S.C. App. 2007) "An act of indirect contempt undermines the orders or activities of the court but involves actions outside the trial court's personal knowledge." *Williams v. State ex rel. Harris*, 690 N.E.2d 315, 316 (Ind.Ct.App.1997). "The distinction between direct and constructive contempt is important because it determines how the contempt proceedings must be brought . . ." *Miller v. Miller*, 652 S.E.2d 754, 375 S.C. 443 (S.C. App. 2007).

The allegation was of conduct between two individuals, on private property far from any Court facility, well outside the presence of any officers of the Court, with no contemporaneous record made. (R., 9-11). The Magistrate Court's power of direct contempt cannot, and does not, extend so far. *See* S.C. Code §22-3-950 (*supra*); *see also* S.C. Code §22-3-510 (abolishing prior common-law magistrate jurisdiction); S*ee generally* "South Carolina Magistrate Judge's Bench Book," §(D)(5)(a), "Contempt" (Stating that magistrate judges have the power to punish for *direct* contempt in the presence of the court and in only three other specific listed circumstances -- failure to obey a witness subpoena, contempt of court by attorney, or failure to comply with a time payment plan – none of which apply here, and citing in support S.C. Code Ann. § 22-3-950; Op. Att'y Gen No. 78-191; S.C. Code §22-3-950; § 22-3-930 ; § 40-5-510; § 17-25-350).

The Court's error is demonstrated by the fact that the trial Court ordered a bench trial to take place and allowed witnesses to be called; if this had been a situation where a finding of direct contempt was appropriate and applicable, no trial at all need have occurred, because no trial at all is necessary for direct contempt committed in the presence of a magistrate judge – the judge may

simply issue a finding. Direct contempt that occurs in the court's presence may be immediately adjudged and sanctioned summarily. S.C. Code §22-3-950; *See* also *Brandt v. Gooding*, 630 S.E.2d 259, 368 S.C. 618 (S.C. 2006)(Both criminal and civil contempt penalties appropriate where an individual had introduced a false document at a deposition); *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, *supra*. (""Direct contempts can be penalized summarily in light of the court's substantial interest in maintaining order and because the need for extensive factfinding and the likelihood of an erroneous deprivation are reduced. Greater procedural protections are afforded for sanctions of indirect contempts[.]") The very fact that a fact-finding bench trial was found necessary – the fact that there were facts in dispute that had to be determined by a fact-finder – demonstrates the alleged violation was outside the Court's power of direct contempt.

Magistrate courts are courts of limited jurisdiction, and that jurisdiction is set by the Legislature. S.C. Constitution, Article V, Section 26, "Magistrates" ("The Governor, by and with the advice and consent of the Senate, shall appoint a number of magistrates for each county as provided by law. The General Assembly shall provide for their terms of office and their civil and criminal jurisdiction."). *See also* S.C. Code §22-3-510 et seq. (limiting the jurisdiction of magistrate courts); see also *Martin v. Ellisor*, 264 S.C. 202, 213 S.E.2d 732 (S.C. 1975) (holding specifically that Richland County Magistrate Court is a court of limited jurisdiction). As such, it only has jurisdiction where the legislature has expressly granted same by statute. *Bayly v. State*, 724 S.E.2d 182, 397 S.C. 290 (S.C. 2012) (stating that South Carolina Magistrate Courts have jurisdiction as granted by the legislature). The Court did not have jurisdiction under §22-3-950 as the alleged incident was outside the Court's presence. The Court did not have jurisdiction under §22-3-540 as the fine in question was $500, well over the $100 statutory limit. The Court did not

have jurisdiction under any of the other specific provisions listed in the Bench Book as allowing contempt jurisdiction (§ 22-3-930 ; § 40-5-510; or § 17-25-350).[3] The only other source of law from which the magistrate court could have derived jurisdiction, then, is S.C. Code §22-3-550. §22-3-550 grants magistrates criminal "jurisdiction of all offenses which may be subject to the penalties of a fine or forfeiture not exceeding five hundred dollars, or imprisonment not exceeding thirty days, or both."

However, §22-3-550 requires a corresponding statutory criminal provision – a statutory "offense," conviction under which is subject to the listed range of penalties. Said another way, for jurisdiction to attach under §22-3-550, the defendant must be charged with an "offense" with a listed penalty within the statutory range.. The statutory provision which criminalizes the alleged conduct at issue in this case is S.C. Code §16-3-1770 (C), which states "A restraining order issued pursuant to this article conspicuously must bear the following language . . . Violation of this order is a criminal offense punishable by thirty days in jail, a fine of five hundred dollars, or both." SC Code §16-3-1900, ("Definitions")(2019). The power to arrest and charge on violation of §16-3-1770 is granted by S.C. Code §16-3-1800, which states "Law enforcement officers shall arrest a defendant who is acting in violation of a restraining order after service and notice of the order is provided. An arrest warrant is not required." Importantly, an arrest warrant is *allowed for* but not *required*, while arrest by a law enforcement officer is mandated ("shall").

Here, no law enforcement officer arrested Ms. Patton nor charged her with any statutory violation. A warrant could have been issued – if there had been sworn testimony to support it – but such did not occur. The net result was that Ms. Patton was never, at any point prior to her trial,

[3] Not mentioned in the Bench Book is 22-5-510 (G), which grants Magistrate judges contempt power to enforce the provisions of §22-5-510, governing the setting of bond. This further emphasizes that magistrate courts only have contempt power when specifically granted same by the Legislature.

either given proper notice of the charges against her or actually "charged" with any "offense" within the meaning of S.C. Code §22-3-550. This is clearly shown by the presence of her case below on the civil docket, not the criminal (*See* Richland County Public Index, Case# 2019OR4010100063).

South Carolina magistrate courts have jurisdiction over direct contempt "in the presence of the Court", whether civil or criminal, under §22-3-950. They also have jurisdiction over indirect contempt under §22-3-550 "for failure to pay the restitution ordered" – that is, their indirect contempt power is specifically limited to ordering the payment of restitution, a civil contempt remedy not at issue here. Apart from those specific provisions, South Carolina magistrate courts do not have general jurisdiction over indirect criminal contempt unless the individual has been arrested and charged with the crime of contempt (specifically, either a violation of §16-03-1770, violation of a magistrate's restraining order, or of § 22-03-950, direct contempt). This is made clear by the utter absence, in §22-3-950, of any mention of any grant of jurisdiction over alleged contempt *outside* the presence of the Court; the statutory language specifically limits its grant of jurisdictional authority to direct contempt in the presence of the Court. This is a clear distinction from the *general* grant of contempt authority to *Circuit* Courts under §14-5-320 ("The circuit court may punish by fine or imprisonment, at the discretion of the court, all contempts of authority in any cause or hearing before the same.") If the Legislature had meant to grant similar broad contempt power to magistrate judges, it would have done so clearly. It did not. It specifically granted only limited authority, and these facts are outside those limits.

Because there was no arrest here, and because the magistrate court lacks jurisdiction over indirect criminal contempt outside the Court's presence without an arrest, this case is void for lack of subject matter jurisdiction. "[I]ssues related to subject matter jurisdiction may be raised at any

time." *State v. Rogers* (S.C. App. 2016). Appellant therefore requests that her conviction be reversed and the charges against her declared void and dismissed.

II. DID THE TRIAL COURT COMMIT A REVERSIBLE ERROR OF LAW BY REFUSING TO DISMISS MS. DOTY'S ALLEGATIONS OF CRIMINAL CONTEMPT WHEN THERE WAS NO PROPER PROSECUTOR AND MS. DOTY LACKED STANDING TO REQUEST A CRIMINAL REMEDY?

Private citizens cannot pursue criminal complaints in South Carolina. Only prosecutors, or arresting officers prosecuting cases in traffic court, may prosecute criminal offenses in South Carolina. *See* S.C. State Constitution, Article V, §24 ("The Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record."); *Mary C. McCormac, Esq.*, 2015 WL 3919079 (S.C. A.G. Opinion, 2015)(prosecuting officers derive their authority to prosecute from specific designation of prosecutorial authority by the Attorney General); *State v. Sossamon*, 378 S.E.2d 259 (S.C. 1989) (allowing arresting officers, and *only* arresting officers, to prosecute cases in Magistrate Court). In order for an attorney who is not an employee of a solicitors' office or the Attorney General's Office to prosecute a criminal action, he must present a memorandum of understanding from one of those offices granting them permission to prosecute the criminal charge. *State v. Addis*, 257 S.C. 482 (1972). No such memorandum was presented here.

Ms. Doty's Complaint admitted, on its face, that "she has requested that Richland County Deputies arrest Defendants; however, the deputies have not done so." That is a choice within the discretion of the executive branch, not Ms. Doty. The Attorney General of South Carolina has not delegated prosecutorial authority to Ms. Doty or to her counsel. To the extent her Complaint requested criminal prosecution, criminal sanctions, or a criminal remedy, it was

improper and dismissal was required. Simply put, Ms. Doty lacked standing to bring criminal charges.

The trial judge ruled that the prosecution could nevertheless proceed under the Court's own contempt authority. This ruling was in error because it failed to appropriately distinguish between the trial Court's powers in "direct" and "indirect" criminal contempt (as reviewed above).

There was therefore no party present in the courtroom at the time of trial with standing to bring this criminal charge. *See State v. Sossamon*, 378 S.E.2d 259 (S.C. 1989) (allowing *only* state prosecutors, arresting officers, or officer's supervisors to prosecute cases in South Carolina magistrate Courts). Said another way, a trial requires a prosecutor; if there must be a trial, there must be a prosecutor. A private party cannot fill that role. The South Carolina Supreme Court has already ruled on this issue in the specific context of Richland County Magistrate Courts. *See In re Richland Cnty. Magistrate's Court*, 389 S.C. 408, 699 S.E.2d 161 (S.C. 2010) ("[A]llowing prosecution decisions to be made by, or even influenced by, private interests would do irreparable harm to our criminal justice system.")

This issue was raised to and ruled upon by the trial court and the Defendant's motion to dismiss was denied. (T, at 5, "I'd actually like to make a motion to dismiss . . . based on lack of prosecution. What they're alleging in this Complaint, the remedy they're seeking, is criminal contempt penalties. And . . . for criminal contempt penalties you need a prosecutor, you need someone to actually go out and arrest the person for criminal contempt and charge them, and none of that happened."; T, at 10, "Obviously this is not something that happened in the presence]of the Court]").

The failure to dismiss the allegation of criminal contempt on those grounds – lack of standing to prosecute and the absence of an appropriate prosecuting party – is reversible error, and

the trial Court must be reversed and the matter dismissed on those grounds.

III. DID THE TRIAL COURT COMMIT A REVERSIBLE ERROR OF LAW AND/OR ABUSE ITS DISCRETION BY ALLOWING A TRIAL TO TAKE PLACE WHEN DEFENDANT HAD BEEN PROVIDED WITH NO ADEQUATE NOTICE OF THE CHARGE SHE FACED AND NO DISCOVERY IN ADVANCE OF THE TRIAL DATE, IN VIOLATION OF THE REQUIREMENTS OF *BRADY* AND SCRCP, Rule 5?

The absence of an appropriate prosecuting authority was not a mere process violation, but resulted in concrete harm to Ms. Patton's defense and to the pursuit of justice in this case, as it meant that Ms. Patton was not provided with adequate notice of the charges against her and that no discovery at all was provided to Ms. Patton's defense counsel prior to the date of trial.

Ms. Doty's Complaint on the Rule to Show Cause was, fundamentally, a civil filing, not a criminal one. (R, 9-11). Neither Ms. Patton nor her counsel were thus adequately notified, in the absence of either a uniform traffic ticket or an arrest warrant or an indictment, of the danger that she faced any specific criminal charge; indeed, the Complaint made only the vague request that Ms. Patton "be found guilty of a criminal offense and be punished by spending time in jail[,]" and the trial Court never made specific findings of fact as to how Ms. Patton had violated its Order. (R, 9); (T, 49)("I do find Ms. Patton in criminal contempt beyond a reasonable doubt based on the testimony."). It was not even clear to Ms. Patton's counsel until well after the trial date what specific statutory provision Ms. Patton had been sentenced under; the Richland County Public Index does not record a criminal contempt charge filed against Ms. Patton until March 18, 2020, when ticket #2020A4010100001 was filed, erroneously listing an "arrest date" of February 19, 2020, the date of the hearing.

This was a violation of Article I, Section 14 of the South Carolina Constitution ("Any

person charged with an offense shall enjoy the right . . . to be fully informed of the nature and cause of the accusation.")

Even more critical, however, was the total lack of discovery provided to Ms. Patton's counsel. As an initial threshold matter, the South Carolina Rules of Criminal Procedure bind prosecutors, not non-prosecutor private attorneys. *See* SCRCP, Rule 5. Without an appointed prosecutor, there is no individual upon whom a defense attorney may properly serve a Rule 5 discovery request.[4]

The more troubling aspect is that a state prosecutor, unlike a private attorney, is obligated to disclose information to a criminal defendant when this information possesses either exculpatory or impeachment value in the defense of the criminal allegations. *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150, (1972), *Arizona v. Youngblood*, 488 U.S. 51 (1988) and *Kyles v. Whitley*, 514 U.S. 419 (1995). The law requires the prosecution produce *Brady* and *Giglio* material whether or not the defendant requests any such evidence. *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *United States v. Agurs*, 427 U.S. 97 (1976). *Milke v. Ryan*, 711 F.3d 998, 1003–04 (9th Cir. 2013). "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). A complaint may be dismissed with prejudice for failure to comply with evidentiary rules. *See* SCRCrimP, Rule 5 (d)("Regulation of Discovery").

That fact that Ms. Doty's counsel provided no exculpatory information is not surprising, but was rather consistent with his duty as Ms. Doty's attorney. He could not maintain his ethical duty to his private client while also upholding the ethical requirements of a criminal prosecutor in South Carolina.

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[4] Defense counsel did request discovery from opposing private counsel, but was not provided with anything at all prior to the trial date.

Rule 1.7 of the South Carolina Rules of Professional Conduct states that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." A concurrent conflict exists when either "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." *See also* ABA Model Rules for Professional Conduct.

The Comment to Rule 3.8 of the South Carolina Rules of Professional Conduct adds that prosecutors have "the responsibility of a minister of justice and not simply that of an advocate." And the South Carolina Supreme Court has cautioned that prosecutors are "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *State v. Peake*, 353 S.C. 499, 509 (2003). These responsibilities apply to any individual who is properly appointed to prosecute a case by a solicitor or the Attorney General. *City of Lake City v. Daniels*, 268 S.C. 396 (1977). Any materials which present Ms. Doty's claims as false or shed doubt on her credibility must be turned over by a prosecuting attorney in this matter under Rule 3.8. However, Ms. Doty's counsel could not turn over such information without violating rule 1.2(a)., 1.3 (see comment 1), 1.6, 1.7, and 1.8. This inherent conflict is one of the many reasons that South Carolina does not allow private criminal prosecutions – it inevitably creates an irresolvable conflict.

The failure of Ms. Doty's attorney to provide any evidence at all to Ms. Patton's counsel prior to the date of trial inevitably harmed the ability of Ms. Patton's counsel to adequately prepare for trial. While the trial Court attempted to cure this defect by refusing to admit much of the alleged

evidence submitted by Ms. Doty's attorney on the trial date, this cure was insufficient.

This insufficiency is shown by the face of the Complaint, which made clear that there had been numerous calls to police regarding the alleged criminal conduct, and that the responding officers had refused to arrest or prosecute Ms. Patton in response to those calls. A State Prosecutor would have been obligated to produce any incident reports or investigator's notes for those incident dates.

Those incident reports are material and favorable to the defense and thus constitute exculpatory *Brady* material. We know this because, fortuitously, several incident reports – documenting complaints made on February 24, 2014, October 14, 2014, February 9, 2017, and March 3, 2017 -- were somehow included in the Record on Appeal. (R, 71-76)[5]. Defense counsel thus saw them for the first time only after the Notice of Appeal had been filed and the record below assembled and filed with this Court. These incident reports are exculpatory in several important respects. They document that Ms. Patton was the first to complain to law enforcement about Ms. Doty's conduct, on February 24, 2014 (R, 75). They document that Ms. Patton made three separate complaints to law enforcement about Ms. Doty's conduct to Ms. Doty's one. (R, 71-76). The one incident report requested by Ms. Doty is especially important as it makes a wild and unsubstantiated allegation (that Ms. Patton was naked in the front yard) which the responding officer was not able to confirm. (R, 73). Not only does the incident report itself verify that the responding officer was unable to confirm that allegation, it also has the virtue of informing defense counsel of the date and time of the alleged incident, which in turn would have allowed Ms. Patton to attempt to rebut said allegation (Ms. Patton is very rarely alone, as she requires the assistance

[5] Importantly, these were *not* the incident reports for the dates cited in Ms. Doty's initial complaint – June 17, August 5, and August 9, 2019. There thus remain, at minimum, at least three outstanding incident reports which have never been provided to defense counsel.

of a personal care aide for health reasons). Defense counsel also would have been able to call the responding officers as witnesses to testify both to their inability to confirm Ms. Doty's allegations and to Ms. Patton's repeated efforts to bring Ms. Doty's conduct to the attention of authorities. All of these together demonstrate a long prior history of conflict and antipathy between the two parties, which would have provided defense counsel material for cross-examination as to her motivation and credibility. There is thus a very high, far more than reasonable, probability that the outcome of the trial would have been different had these incident reports been disclosed to defense counsel before trial.

For those reasons, the trial court was in error and abused its discretion in failing to dismiss this case based upon the failure of Ms. Doty's attorney to provide discovery to Ms. Patton or her attorney prior to the trial date. This issue was raised to and ruled upon by the trial court (T, at 11) ("Just as a practical matter . . . the only materials I've got in this case have come from my client. .. . without a prosecutor to send a rule 5 to, to send discovery requests to, I don't know anything about what's going on in this case. I don't know anything about the allegations beyond the bare face of the complaint. My client at minimum has the right to see all the evidence against her and present a defense, and we don't have any of that.") Contemporaneous continuing objections were made throughout the proceeding, and further objections would have been futile. (T, 38-40).

The discovery of this *Brady* violation requires, at minimum, reversal and remand under *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (requiring remand for a new trial where after-disclosed evidence was material, exculpatory, and had a "reasonable probability" of altering the results of the proceeding below). Because there is no proper prosecuting authority below who could ensure that no further violations of Defendant's discovery rights are protected, however, no future fair trial can occur, and thus dismissal is the only remaining valid remedy.

IV. DID THE TRIAL COURT COMMIT A REVERSIBLE ERROR OF LAW WHEN IT DENIED MS. PATTON'S REQUEST FOR JURY TRIAL?

On the scheduled bench trial date, Ms. Patton's attorney invoked her right to jury trial (T, 5-12; R, 16-19). Ms. Patton has a right to a jury trial under the South Carolina Constitution and by statute. S.C. Const. Art. I § 14; S.C Code § 22-2-150.

Article I, §14 of the South Carolina Constitution states

> "The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both. (1970 (56) 2684; 1971 (57) 315.)
> S.C. Constitution, Article I, Section 14.

The denial of the right to trial by jury is immediately and directly appealable and need not be preserved. "The majority of cases requiring immediate appeal involve review of denials of trial by jury and are based on the public policy consideration of advancing the constitutional mandate to preserve the right to trial by jury inviolate. " *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 533 S.E.2d 575 (S.C. 2000), citing *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997); *C & S Real Estate Services, Inc. v. Massengale*, 290 S.C. 299, 350 S.E.2d 191 (1986); *First Union National Bank of South Carolina v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct.App.1998); *Preferred Sav. Bank, Inc. v. Elkholy*, 303 S.C. 95, 399 S.E.2d 19 (Ct.App.1990). This constitutional guarantee has traditionally been applied in every case "in which the right to a jury was secured at the time of the adoption of the Constitution in 1868." *Mims Amusement v. Law Enforcement Div.*, 621 S.E.2d 344, 366 S.C. 141 (S.C. 2005). The right to a jury trial also encompasses forms of action that have arisen since the adoption of the Constitution in those cases where the later actions are of like nature to actions which were triable at common law at the time of the adoption of the Constitution. *Id.*

This has, with time, been expanded to include all criminal charges which carry a potential sentence of six months or more, including contempt charges. *See*, e.g., *Dimarco v. Dimarco*, 393 S.C. 604, 713 S.E.2d 631 (S.C. 2011).

Beyond those common-law expansions, the constitutional right to trial by jury has been additionally expanded by statute in South Carolina. S.C. Code §22-2-150 provides for the right to a jury trial in *all* criminal cases within the magistrate court. S.C. Code §22-2-150 (1979); *see also State v. Warren*, 255 S.E. 2nd 668, 273 S.C 159 (1979). Ms. Patton was sentenced to a criminal penalty in magistrate court, therefore, Ms. Patton was entitled to a jury trial before that sentence under §22-2-150.

The trial Court's refusal to grant Defendant's request for a jury trial was an impermissible Constitutional and statutory violation and requires reversal and remand.

CONCLUSION

Appellant was denied her right to know the charges against her, her right to be tried in a Court of competent jurisdiction, her right to an appropriate prosecutor, her right to discovery, and her right to jury trial.

Appellant Tina Patton therefore requests the following relief:

I. That this Court rule the judgment and sentence below is VOID for lack of subject matter jurisdiction.

II. That the trial Court's denial of the motion to dismiss for lack of standing and lack of appropriate prosecution be REVERSED, and the charge below DISMISSED on those grounds.

III. That the trial Court's denial of the motion to dismiss for lack of discovery be REVERSED, and the charge below DISMISSED on those grounds.

IV. That, in the alternative, if the above requested relief is

not granted, that the trial Court's denial of Appellant's request for jury trial be REVERSED, and the charges REMANDED and set for jury trial.

Respectfully submitted,

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January 24, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing document to be served upon opposing counsel via electronic mail in the above captioned case, on this date, January 24, 2022.

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