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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh Judge

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

State of South Carolina, Respondent,

v.

Dustin Lee Hooper, Appellant.

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

Appellant Dustin Hooper, through his undersigned counsel, respectfully submits this Petition for Rehearing and Suggestion for Rehearing En Banc regarding the Order dismissing his appeal, filed on May 18, 2022.

INTRODUCTION

This Petition relates to the timeliness of Appellant's second post-trial motion. It also concerns the Trial Court ignoring a statute, as well as the case law which serves as the precedent for the statute's application. Petitioner moves this Court for the opportunity to supplement the Amended Record on Appeal by submitting a Certificate of Service for the Motion for Relief from Judgment which was created for his second post-trial motion. Counsel for Respondent, William M. Blitch, Jr., Assistant Attorney General, has no objection to the addition. Appellant

contends the Certificate of Service removes any question of the timeliness of his second post-trial motion.

Appellant filed a Motion for Relief of Judgment on August 5, 2019, by placing it in the U.S. Mail. On August 8th the undersigned was directed to change the name of the document. The document name was changed to Motion to Vacate by way of a Motion to Amend on August 9th. The Trial Court did not find the second post-trial motion failed for timeliness. The State did not address timeliness until the Appellate level.

The State pursued its prosecution of the case using State vs. Landis, 362S.C. 97, 606 S.E.2d 503 (2004) as its basis for the affirmation of the Trial Court's ruling. The State believes the facts found herein are nearly identical to *Landis* and the holding in it should control. Appellant considers Town of Mt. Pleasant v. Roberts, 393 S.C. 332 (2011) is in tune with legislature, which should have been the focus of the Trial Court rather than ignoring precedent and making an erroneous finding.

Appellant submits that the trial court erred in proceeding with the trial because the Anderson County Sheriff's Office chose to have a car used for traffic control operated without a video camera required by statute since 1998. The Court simply refused to abide by the seminal case involving a jurisdiction failing to act according to the law. In fact, the Court offered the following comment from *Mt. Pleasant*, "Y'all had plenty of time to get cameras." (Amended Record, p. 99, 10). The *Mt. Pleasant* decision was rendered eight (8) years before the Trial Court ignored the fact 8 years had been added onto "plenty of time to get cameras".

PROCEDURAL BACKGROUND

The parties in this case went to trial on March 6, 2019, for a DUI charge against herein Appellant. The jury found the Appellant guilty. On March 8, 2019, the trial court issued an

Order indicating it was deferring sentencing until after an appeal has concluded. Pursuant to Rule 29 of South Carolina Rules on Criminal Procedure (SCRCrimP), Appellant moved to reconsider. On July 25, 2019, the trial court denied the motion and at the same entered sentence for the Appellant. Any post-trial motions were required to be filed within ten (10) days. The tenth day would have been on Sunday August 4th. Therefore, filing and service would be necessary by Monday August 5th.

Appellant filed a Motion for Relief of Judgment via U.S. Mail on August 5, 2019; and served a copy of same by mail to the Court and the Respondent. In his motion, Appellant prayed for the Trial Court to vacate the judgment based on inadvertence. Appellant averred the Trial Court failed to rule on the issues of absence of video and failure by Respondent to provide an affidavit to address an exception available to it. Appellant learned his August 5th filing of a Motion for Relief of Judgment was deemed not acceptable as titled. Thus, he re-filed the motion as a Motion to Vacate Judgment, while also filing a Motion to Amend to provide the opportunity to file it. Appellant asserted the contents of the motion as well as the prayer for relief did not change with the title. Assuming the filing was timely, the title of the filing should not control the message of same.

On August 27, 2019, the trial judge summarily dismissed the Motion to Amend, Motion to Vacate and Motion for Relief of Judgment. Despite the dismissal, the Court heard the same on August 29, 2019, where the court issued a second Order denying Appellant's Motion to Vacate Judgment. Appellant perfected his Notice of Appeal on August 30, 2019.

Pursuant to Rule 208 of the South Carolina Appellate Rules of Court (SCACR), Appellant filed his Initial Brief of the Appellant and Designation of Matter to be Included on Record on Appeal on December 23, 2019. Respondent moved for an extension to file its Initial

Brief, which was granted by the Court. On January 22, 2020, Respondent filed a Motion to Dismiss challenging the timeliness of the appeal. The Appellant filed his return in a timely manner.

ARGUMENT

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

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

A. A successive post-trial motion was necessary for issue preservation.

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

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

Appellant had a right to file his Motion to Vacate Judgment, under Rule 29 SCRCrimP. The respondent's use of *Pfeiffer* is misplaced. In that case, the Appellant had filed a motion to correct a clerical error which the Court granted; and it corrected the error. Immediately following the modification of the original sentence Appellant's co-defendant was sentenced to

less time. Appellant filed a Motion to Reconsider for a reduction in sentencing. Since the second motion had nothing to do with the initial motion, it did not toll the time for appeal.

The above ruling in ***Pfeiffer*** does not apply in this case because the Motion to Vacate Judgment filed by Appellant was related to the prior motion. Moreover, a second post-trial motion had to be filed to preserve the errors the Trial Court purposely failed to address in his denial of relief. In *Coggeshall*, the Appellant failed to make a post-trial motion part of the record which allowed the trial court's summary denial to stand because the issue had not been preserved for the appellate court to rule. Coggeshall v. Reach, 655 SE 2d 476 - SC: Supreme Court 2007.

B. The filing of the second post-trial motion was timely.

The Trial Court in this matter simply denied requests that he follow the law. This case is exactly the same as *Mt. Pleasant.* As in the former case, Anderson County Sheriff's Office had a vehicle sans a video camera monitoring traffic. The Trial Court attempted to shift the burden of explaining the lack of a camera on the Appellant. "There's no evidence in the record to suggest this car had been out for a long period of time." (Amended Record, p. 112, 7.9).

The State had the obligation of explaining why the vehicle was not fitted with a camera. They did not even pretend to have an explanation. Moreover, there was evidence in the record that Officer Coons, the first officer, drove the car assigned to him. He explained he is part-time; and he uses it on Wednesdays and the Saturdays he doesn't have his children. (Id., p. 51.52, 25.11). He said without qualification, "The car is not equipped with video." (Id., p. 50, 17). He did not say it was out getting worked done or it would soon be installed. His testimony was his car was still not equipped with a camera- two and a half years after he stopped the Appellant.

The Court's conclusory statement that the trooper was the arresting officer is void of reason, like the rest of his "analysis" in this case. In *Landis*, Trooper Davis witnessed Landis

driving erratically. Before he could reach Landis, a member of the State transport police was in the proximity and pulled him to the side of the road. Davis arrived simultaneously with the transport officer. He did all of field sobriety tests and arrested Landis. Davis's camera was inoperable. Davis created the necessary affidavit relating to the failure to video; and the conviction was affirmed.

Officer Coon had been with the ACSO since 2014 at the time of the trial in this case. He had a Crown Vic assigned to him for a vehicle. At the 2019 trial, his car remained unequipped with a video camera. That is why the Court made Trooper Davis the arresting officer. The Court recognized if he allowed Coon to be the arresting officer, his reversal would be inevitable.

The Court's assessment finding Coon was not the arresting officer was as void of substantiating comment as the rest of the decisions made in the lower court. In the second post-trial motion hearing held on August 29, 2019, the Court discussed the county's lack of a camera in Coon's car at length. From that topic, he ruled without discussion.

> And so, under the case that you cite, *Landis*, the second person who was the arresting officer under the statute did have a video; so, therefore, requirements of the statute are met. (Amended Record, p. 123, 15.18.).

Coon was the arresting officer. He found the car which was the subject of a BOLO. He turned on his blue lights which should have initiated the absent camera. He testified to the following observations:

> A. At that point, we proceeded through the traffic light. I noticed the vehicle tried to ease over to the right-hand lane, and I initiated my blue lights. Watched the vehicle make several attempts to the right-hand side of the road as it was trying to get off the roadway, and then took an immediate right turn onto Walker Drive. Rested about 200 yards down onto a service center parking lot.

(AR, p. 47, 3.10).

13 A. The attempt to turn, to me where the vehicle
14 was trying to exit the roadway using no turn signal,
15 but there's several turnoffs right there.

(Ibid., 13.15).

16 A. Upon me asking for his driver's license, he
17 made several attempts to look in his wallet. He
18 never produced his driver's license, and he tried to
19 hand me what appeared to be a debit card.

(Ibid., p. 48, 16.19).

2 A. Mr. Hooper was very dazed, speech was slurred,
3 and very disoriented.

(Ibid., p. 49, 2.3).

14 Once I made contact with the vehicle and
15 understood that it was probably suspicion of driving
16 under the influence, I gave a motion and the highway
17 patrolman came over and took control of the scene at
18 that point.

(Ibid., p. 49, 14.18).

Coon initiated the blue lights because of the BOLO. He "observed" all of the above-referenced "textbook" traits of an impaired driver. In an effort to somehow diminish his DUI observations, he said, ***probably suspicion of driving under the influence.*** There is absolutely no question Dustin Hooper was arrested at that time.

Landis also cited the case of *State v. Garvin* in determining the arresting officer.

> The term "arrest" has a technical meaning, applicable in legal proceedings. It implies that a person is thereby restrained of his liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made. It is intended to serve, and does serve, the end of bringing the person arrested personally within the custody and control of the law, for the purpose specified in, or contemplated by the process.

State v. Garvin, 341 S.C. 122, 55 S.E.2d 591 (Ct. App. 2000) as cited in *Landis*. According to Coon's testimony, Appellant was drunk, high, disoriented, slurring his speech, etc. He was the one who stopped Appellant. He was the one made the above-referenced observations which illustrated Appellant needed to be "restrained of his liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made."

Officer Coon was the man who pulled Appellant over for in part his erratic driving. Officer Coon was an officer of the law armed with lawful process which he utilized. ***Officer Coon was required to arrest Appellant.***

In South Carolina, in order to be found guilty of DUI the individual charged ***must*** have his conduct video recorded by the State. S.C. Code Ann. §56-5-2953(A). More importantly, "the video ***must*** not begin later than the activation of the officer's blue lights". According to Merriam-Webster the word must means "to be required by law". The State did not video from the initiation of the blue lights as required by the law. Not only that, but there was also never any testimony or evidence which allowed for circumvention of the statute. Then again, what was Coon's affidavit going to say? I arrested a man for driving under the influence, but I handed him off to the State Police because I didn't have, nor have I ever had, a camera?

Appellant's post-trial motions were filed in response to the trial judge's failure to specifically rule on the issues of the absence of video and failure by Respondent to provide a sworn affidavit as an exception to the DUI Videotaping Law. These issues were raised by Appellant in his Motion for Reconsideration. The judge's failure to provide a reason as to why he believed he could disregard the true meaning of the statute and ignore the precedent set with the issuance of *Mt. Pleasant,* needed to be preserved for this Court to review. It is imperative

that the Appellate Court has the opportunity to address such an egregious failure to apply the law and the precedent of the application found in *Mt. Pleasant.*

The summary dismissal of Appellant's issues in his Motion for Reconsideration, is a valid ground for a motion to vacate. The Motion to Vacate was filed due to someone's dislike for Motion for Relief of Judgment which was originally filed. Thankfully, not having the exact name of the legal doctrine used in arguing the preserved issues is not fatal-as long as the arguments being made regarding the issues are clearly related to those being raised. State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010).

The subsequent motions were timely filed.

Respondent contends that the Motion for Relief of Judgment and Motion to Amend and Motion to Vacate were not timely filed. Respondent claimed that since the Motion for Relief of Judgment was clocked on August 8, 2019. The motion was mailed to the court and Respondent on August 5, 2013. Absent a provision prohibiting filing and serving motions in criminal cases by mail, Appellant believes that filing and service by mail is complete upon mailing. Appellant prays the Certificate of Service which memorialized the mailing of the documentation will be accepted given the fact the State has graciously withheld any objection to same.

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

appeal." Anonymous v. State Board of Medical Examiners, 323 S.C. 360, 473 S.E.2d 870, 879 (Ct. App. 1996).

The Notice of Appeal was timely filed.

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

CONCLUSION

The Trial Court in this matter decided for whatever reason he was simply not going to adhere to the law. Despite the clear language of the statute, he went around the end by offering one sentence about who the arresting officer was in October of 2016. He didn't apply the facts of this case to *Landis* because he would have recognized his error. Counsel for Respondent summed it up nicely. While Mt. Pleasant was using the lack of funds to excuse their illegal conduct, ACSO was simply handing the case off to another agency to do the investigation due to the understanding their prosecution would fail. (AR, p. 123, 3.6).

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