

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Sep 05 2023

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Ninth Circuit Court Judge

App. Case No. 2023 - 000763
COA Case No. 2022-1146

J. K. Holmes,

Respondent,

v.

C. E. Holmes,

Petitioner.

**Motion for Clarification and Amended Motion to Reconstruct the Record of the Impermissible
Ex Parte Hearing For Which the SCCA, Without Explanation, is Unable to Locate the Missing
Audio for Transcript Despite Audio For All Other Hearings On That Date**

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Without adopting an adversarial tone, it is essential to address certain points of contention with the opinion dated August 10, 2023. The petitioner respectfully registers objections and seeks reconsideration. Specifically, the aforementioned opinion fails to address the petitioner's plea for remand to reconstruct the trial court record. Curiously, no recording of the hearing in question can be located, in stark contrast to recordings for all other hearings on the same day. This absence raises concerns. (Exhibit 1) Notably, both the circuit court and the petitioner received no notice for the impermissible *ex parte* hearing on appeal herein. The Court of Appeals' order states, in part, "allowing a subsequent appeal without an additional case initiation fee." In contemplation of a second appeal, if any, the petitioner underscores the urgency in reconstructing the trial court record as soon as possible. It is crucial to note that respondent's counsel, through the use of unprofessional and false defamatory statements, including but not limited to the first sentence of the Argument on page two of counsel's return dated June 7, 2023, violated Rule 11, SCRPC, and the FPA (S.C. Code § 15-36-10). These statements were presented to this Honorable Court for the Court's reliance and disseminated online. The petitioner requests sealing the record herein and emphasizes the need for confidentiality regarding family court matters which is hereby requested. Furthermore, there is an undeniable right to a complete and accurate reconstruction of the trial court record. This is especially pertinent in light of alleged misconduct by respondent's counsel, aimed at influencing the case unfairly. It is reasonable to speculate that such misconduct extended to the impermissible *ex parte* hearing, the absence of audio recordings, and a consequential lack of evidence for appeal. *See Clements v. Young*, 310 S.C. 73, 425 S.E.2d 63 (Ct. App. 1992) (appellant moved for reconstruction of the record on remand to the lower court where the hearing was unrecorded); *Toal et al., Appellate Practice in South Carolina*, 3rd Ed. (2016), p. 378. Without a transcript or reconstructed record, there can be no meaningful review for reversible error which in itself is reversible error. *See Orpiano v. Johnson*, 687 F.2d 44 (4th Cir. 1982)

("(F)ailure even to have a transcript filed ... was reversible error."). Accordingly, motion to seal the record herein and to remand for reconstruction of the trial court record is respectfully submitted.

Moreover, the COA opinion in question exhibits internal inconsistencies. Notably, the notice of entry of judgment on July 14, 2022, conflicts with the pending Rule 59(e), SCRPC. Adding to this, the motion to recuse in the trial court was granted, rendering the June 9, 2022, order by the recused judge null and void. (Exhibit 2) The COA opinion also suffers from reversible shortcomings. It fails to address new precedent and updated case law raised in a timely manner. A subsequent petition for rehearing, accompanied by a motion for reconsideration, was refused for filing without just cause. (Exhibit 3) Notably, the Third Edition of Toal et al.'s "Appellate Practice in South Carolina" offers relevant controlling precedent, overlooked or misunderstood by the lower appellate court. Toal *et al.*, *Appellate Practice in South Carolina*, 3rd Ed. (2016), p. 155-157. An issue is denial of the petitioner's right to trial by jury in a law case. *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E. 2d 81 (2008). "[S]ome minimal inquiry will always be necessary on the part of the appellate court considering the appealability of an order which is alleged to have deprived a party of a mode of trial." *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000). "These cases not only permit, but indeed **require, immediate appeal.**" *Id.*(emphasis supplied). Immediate appeal is required under these circumstances. *Id.*

It is well established the COA clerk's ministerial duties do not include interpretation of the law including the determination of whether a petition for rehearing is subsequent. The petitioner disputes the clerk's refusal to file, asserting reversible error. Moreover, the role of a ministerial clerk in rendering legal interpretations contravenes constitutional principles. This wrongdoing prejudicially affects the petitioner's rights and disrupts due process. (Exhibit 4, 5) The petitioner is prejudiced thereby. But for denial of substantial rights by a ministerial clerk, the outcome should and would be in petitioner's favor. (Ex. 4, 5) Additionally, review becomes imperative when a single judge sua sponte

delves into external research not present in the record and before jointly filed ROA, violating Rule 242(b), SCACR. The lower appellate court's failure to provide this Honorable Court and the affected party with outside-the-record internet research expressly relied upon in the COA order on appeal impedes meaningful review. Such actions undermine the appearance of a disinterested court. This Honorable Court, as the court of last resort, is empowered to correct this breach of public trust. *See Orpiano v. Johnson*, 687 F.2d 44 (4th Cir. 1982) (“(F)ailure even to have a transcript filed ... was reversible error.”).

Multiple inaccuracies and irregularities pervade the trial court record and public index. These inaccuracies, including the erroneous entry of judgment on July 14, 2022, due to a pending Rule 59(e), SCRCR, raise doubts about the credibility of reliance on outside-the-record internet research without date of access, without documentation herein for meaningful review, and without prior notification and opportunity to respond by the adversely affected party. “All courts shall be public.” South Carolina Constitution in article 1, section 9. The petitioner respectfully requests a copy with date of access for information sourced from external internet research and relied upon in the COA's December 9, 2022, order. Numerous irregularities within the trial court and COA persist, underscoring the need for comprehensive review. (Exhibit 6) The use of external research not present in the record hampers informed decisions and diminishes/thwarts meaningful review. The lower appellate court's order falls short of the requisite adequate explanation for meaningful appellate review. *See, e.g., Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 146 (4th Cir. 2020) (remanded for lack of adequate explanation for meaningful review: “(T)he court disposed of the substance of the issue in a single sentence. *See J.A.* 252. We need more explanation to conduct meaningful appellate review of the court's disposition of the motion.”).

Documentation reveals that a Rule 240(j), SCACR, appeal was filed in the COA. Sua sponte dismissal of an appeal by a single individual without factual support in the record demands adherence

to the de novo standard as per S.C. Code § 14-8-220. The COA's failure to apply the proper legal standard is reversible error. Pursuant to S.C. Code § 14-8-220, the petitioner asserts lack of uniformity in interpretation and application of statutory authority as well as the SCACR in the lower appellate court. To the extent there is ambiguity, the rule of lenity supports transparency, even-handedness, and fundamental fairness for the Bar, the Bench, and the citizens of this great State. This court holds exclusive authority over these matters. (Ex. 7 and 8)

The petitioner also challenges the following hold-over from Covid interruptions:

(c) Filing of the Appendix under Rule 242, SCACR. In cases seeking review of a decision of the Court of Appeals, Rule 242, SCACR, requires the petitioner to file two copies of an Appendix. This requirement is suspended. Instead, the necessary documents to comprise **the Appendix will be obtained from the electronic records of the case before the Court of Appeals.** Supreme Court Order 2021-08-25-03 in Appellate Case No. 2020-000447 (emphasis supplied).

Litigants should designate the contents of the appendix tailored to the arguments or in the alternative, should be provided with a copy of the court-generated appendix with the right to supplement the appendix with pertinent documents, especially in family court matters where the COA docket is not accessible to the public. In this case, the attached correspondence from the COA is material to review but was not considered by this Honorable Court because it is missing from the court-generated appendix. (Ex. 6) Pursuant to Supreme Court Order 2021-08-25-03 in Appellate Case No. 2020-000447, *supra*, it is unclear why that correspondence is missing from the court-generated appendix. Ambiguity regarding the contents of the court-generated appendix is a denial of due process. Specifically, that correspondence in Exhibit 6 is just one example of COA docketing irregularities and wrongdoing including but not limited to, wrongful refusal to file by ministerial clerk of the lower appellate court. Ministerial duties of the clerk do not include interpretation of the law regarding whether a filing is subsequent. The South Carolina Clerk of Court Manual and the *Miller* case provide as follows:

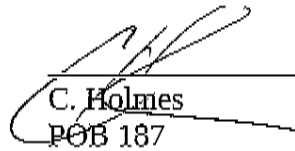
The Clerk of Court's duty is not discretionary. The Clerk of Court should not construe a *filing*.... it is not within the Clerk of Court's authority to refuse to perform her duty based on her opinion that a filing lacks legal merit or is untimely. 21 C.J.S. Courts § 338 (2006) ("[A] clerk of court cannot ordinarily determine questions of law [or] render judgments."). *Miller v. State*, 659 S.E.2d 492, 377 S.C. 99 (S.C. 2008) (emphasis supplied).

In this case, ministerial refusal to file effectively determined questions of law and/or impermissibly rendered judgment by denying meaningful opportunity to be heard at a meaningful time for full and fair review in the lower appellate court as well as the court-generated appendix and review herein, thereby arbitrarily and capriciously denying substantial rights and meaningful appellate review. "There is no limit to the type of motion that could be filed in the appellate courts," including but not limited to, timely motion for reconsideration. *Toal et al., Appellate Practice in South Carolina*, Third Ed. (2016), p. 379. The petitioner is prejudiced thereby. But for the clerk's refusal to file in violation of the SCACR, governing precedent, and Federal and State statutory and Constitutional law, the outcome should and would be in petitioner's favor. To the extent there is ambiguity, the rule of lenity supports petitioner's position. To the extent lower appellate court judge(s) could or would wrongfully co-opt ministerial staff to refuse filings, this Honorable Court is the state court of last resort with authority to establish uniformity in the interpretation and application of statutory authority and the SCACR. As a result, there is no full and fair hearing in the COA and remand to the COA is requested for full and fair hearing including but not limited to, consideration of the timely filed motion for reconsideration and subsequent petition for rehearing, copy attached at Exhibit 5.

Furthermore, allegations of respondent's counsel impugning the petitioner's professional standing merit clarification. Significantly and materially, these false claims reinforce multiple breaches of the FPA (S.C. Code § 15-36-10) and Rule 11, SCRCP, by respondent's counsel including but not limited to, lack of due diligence and failure to independently investigate the facts. The ongoing dissemination is not moot and the persistent wrongdoing is designed to gain unfair advantage and adversely affect pending litigation. Sealing the record herein is respectfully requested.

For substantial justice affecting substantial rights and based on the totality of circumstances, the petitioner seeks a comprehensive resolution. This involves immediate reconstruction of the trial court record. The absence of a transcript or record impedes the prospects of meaningful review on second appeal, if any, rendering the petitioner unfairly prejudiced. (*Orpiano v. Johnson*, 687 F.2d 44, 1982) Accordingly, the petitioner prays for sealing the record herein and remand to the trial court for reconstruction of the record.

Respectfully submitted,



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