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Sep 06 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of General Sessions

The Honorable R. Markley Dennis, Circuit Court Judge

Appellate Case No. 2019-000511

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

AARON MCKENZIE CAPERS,

APPELLANT.

Petition to Submit
Amended Initial and Final Briefs of Appellant
Reflecting Correction to Trial Transcript
Provided by the Court Reporter

TARA DAWN SHURLING
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, SC 29204
(803) 738-8622
(803) 738-1600 FAX
tdshurling@aol.com

ATTORNEY FOR APPELLANT

After being made aware of Counsel for Respondent's intention to object to Rule 211, SCACR, being used to correct the few portions of the Final Brief of Appellant, which reflected this transcription error, Counsel initially announced her intent to request leave of Court to file an Amended Final Brief of Appellant. Counsel filed a Final Brief which did not correct the errors which were the result of this Court Reporter error, but did drop a footnote noting her intent to seek leave of Court to file an Amended Final Brief of Appellant. Counsel then received Respondent's Return which included the State's objection to Counsel being permitted to file an Amended Final Brief.

The chronology of the relevant factors is as follows:

- Respondent submitted a formal challenge to the accuracy of the trial record provided by the Court Reporter in early September of last year. Counsel had already filed the Initial Brief of Appellant by the time that challenge was raised. *See*, Initial Brief of Appellant filed May 17, 2022 and the Amended Initial Brief of Appellant filed June 20, 2022¹.
- It was my sincere belief that the few places where Appellant's Final Brief reflected the transcription error made by the Court Reporter could be corrected under the authority of Rule 211, SCACR. I subsequently discussed that position with Respondent's Counsel and he indicated his objection to that use of Rule 21, SCACR, on the ground that it was not my typographical error which was in question and he had written his Initial Brief in direct response to my Initial Brief. My position was that Rule 211 does not expressly limit itself to typographical errors made by one of the attorneys of record in a direct appeal. In support of that position, I noted that many, if not most briefs, are not actually typed by the lawyers and therefore, many typographical errors found in Initial Briefs and subsequently corrected pursuant to Rule 211, SCACR, were made by third parties; i.e. the support staff who physically typed the brief. Counsel also noted that Appellant was not seeking a new sentencing pursuant to *Aiken v. Byars*, ___ S.C. ___, 765 S.E. 2d 972 (S.C. 2014), despite the fact that his trial counsel made that argument in General Sessions Court. As a

¹ Counsel for Appellant was allowed to file the Amended Initial Brief in order for her to file her DOM and her POS on Respondent's Counsel.

practical matter, I could not have made that argument inasmuch as this was not a murder case. As for my citation to the *Dolan Report*, as cited in an Amicus Brief filed in the Conrad Slocomb case, I suggested that I could simply drop a footnote stating that Appellant was very little past his eighteenth birthday at the time of this crime. My reference to the *Dolan Report* addressed its findings on the impact of long term incarceration on life expectancy, not one of the other issues which impose a bright line rule separating juveniles and adults.

- In this direct appeal, the Court Reporter admitted the transcription error in question and provided her affidavit attesting to that error and advising the parties that she had checked her [backup] tapes and verified the error was hers. On those facts, my position was that the simple solution was to allow this transcription error to be corrected pursuant to Rule 211, SCACR.
- The unusual problem in this direct appeal has arisen because Respondent filed his Initial Brief *after* the Court Reporter's admission of this error, as opposed to *before it was acknowledged* as did Counsel for Appellant. Respondent did so without addressing the intervening acknowledgement of this error by the Court Reporter. As noted elsewhere, the Court Reporter supplied her affidavit acknowledging this transcription error on September 21, 2022. Respondent's Initial Brief was not filed until December 9, 2022. Thus, Respondent knew the transcript was in error and knew that Appellant's Initial Brief was written before the transcription error admitted by the Court Reporter was reported.

If Counsel for Appellant had not believed this error could have been simply corrected in her Final Brief of Appellant pursuant to Rule 211, SCACR, she would have asked for leave of Court to file an Amended Initial Brief in response to the transcription error acknowledged after Appellant's Initial Brief was filed.

Counsel for Appellant now asks that she be permitted to file an Amended Initial Brief in order to correct the few instances where erroneous statements appear in Appellant's Initial Brief due to the transcription error in the trial record provided to her by the Court Reporter at Appellant's trial. She asks to amend her previous request for leave of Court to file an Amended Final Brief to request that she be permitted to file an Amended Initial Brief of Appellant. Such an amended Initial Brief would make only

those changes necessary to edit the text that obviously would have been written differently had Counsel for Appellant been aware of this transcription error before the Initial Brief of Appellant was submitted. Counsel also submits that Respondent should be allowed to file an Amended Initial Brief of Respondent. Appellate Counsel recognizes that the filing of Amended Initial Briefs in this direct appeal, would require that both sides be allowed to file new Final Briefs as well. Counsel for Appellant would also ask that, if the changes to the Initial Brief of Respondent require it, Appellant be allowed to file an Initial and Final Reply Brief as well.

Undersigned Counsel recognizes with hindsight that perhaps she should have submitted a Final Brief with the few minor charges that would have been needed to correct those portions of Appellant's Initial Brief which reflected the Court Reporter's error. Being aware of Respondent's objection to Appellant taking this approach to making the corrections necessitated by this Court Reporter's transcription error, Counsel was reluctant to get into further debate about how this issue should be resolved. In truth, a lengthy delay in this case occurred while the direct appeal was stayed pending rulings on post-trial motions that were not filed by trial counsel until after she, the Appellant's mother, Sharon Capers, Esquire, had filed the Notice of Appeal. When Appellate Counsel became aware that Respondent intended to strongly object to the use of Rule 211 to correct the errors arising from this Court Reporter's error, undersigned Counsel tried to think of the fastest way to correct this error without causing further significant delay. Appellate Counsel now believes that the filing of Amended Initial and Final Briefs in this direct appeal is the best way for the errors in the Briefs in this direct Appeal to be corrected. Counsel submits that filing Amended Initial and Final Briefs is likely the best

and simplest way to have the inaccuracies arising from the error in this transcript corrected.

Respectfully submitted,

s/ Tara D. Shurling

Attorney at Law
S.C. Bar No. 5099

Law Office of Tara Dawn Shurling, P.A.
3614 Landmark Drive
Suite A
Columbia, S.C 29204

(803) 738-8622 Office
(803) 446-3614 Business Cell

tdshurling@aol.com Email

ATTORNEY FOR APPELLANT

This 21st day of August, 2023

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APPEAL FROM BERKELEY COUNTY
Court of General Sessions
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Lower Court Cases No. 2018-GS-08-00532, 2018-GS-08-00531, 2018-GS-08-00528,
2018-GS-08-00529 and 2018-GS-08-00530

Appellate Case No. 2019-000511

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APPELLANT.

CERTIFICATE OF SERVICE

of

Petition to Submit

Amended Initial and Final Briefs of Appellant
Reflecting Corrections Necessary Due to a Transcription
Error in the Trial Transcript Acknowledged and Verified
By the Court Reporter

Undersigned Counsel for Appellant in the above captioned direct appeal hereby certifies that she has on today's date, August 21, 2023, served opposing counsel, Mark R. Farthing, Esquire, a copy of Appellant's Petition to Submit Amended Initial and Final Briefs of Appellant Reflecting Corrections Necessary Due to a Transcription Error in the Trial Transcript Acknowledged and Verified By the Court Reporter. This petition was served upon opposing counsel by way of an email sent to Attorney Farthing to the address listed below.

mfarthing@scag.gov

Respectfully submitted,

Tara D. Shurling

Tara Dawn Shurling

S.C. Bar No. 5099

Attorney and Counselor at Law

ATTORNEY FOR APPELLANT

This 21st day of August, 2023.

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Reflecting Corrections Necessary Due to a Transcription
Error in the Trial Transcript Acknowledged and Verified
By the Court Reporter

Undersigned Counsel previously filed Appellant's Petition to Submit Amended Initial and Final Briefs of Appellant Reflecting Corrections Necessary Due to a Transcription Error in the Trial Transcript Acknowledged and Verified by the Court Reporter. On the date that petition was filed Counsel also filed a Certificate of Service on Opposing Counsel. Due to a clerical error, that COS mistakenly stated that the petition was served upon opposing counsel by way of an email sent to Attorney Farthing on August 21, 2023 to the address listed below. The Petition has been sent to the email address below on today's date by forwarding filing transmittal letter and Petition as filed On August 21, 2023.

mfarthing@scag.gov

Respectfully submitted,

Tara D. Shurling

Tara Dawn Shurling

S.C. Bar No. 5099

Attorney and Counselor at Law

ATTORNEY FOR APPELLANT

This 6thst day of September, 2023.