

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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DEC 27 2023

Appeal from York County
Honorable William A. McKinnon, Circuit Court Judge
Appellate Case No. 2021-001316

SC Court of Appeals

THE STATE,

Respondent,

vs.

TERRY SHAIMEK TYLER,

Appellant.

**RETURN TO MOTION TO STRIKE
AND
MOTION TO EITHER PERMIT THE INCLUSION
OF COPIES OF EXHIBITS
IN THE RECORD ON APPEAL OR
REMAND FOR RECONSTRUCTION**

Respondent (“the State”), through its undersigned counsel, would respectfully show unto the Court as follows:

I.

In July of 2021, Appellant Terry Shaimek Tyler pled guilty to first-degree criminal sexual conduct, kidnapping, armed robbery, and other offenses in the York County Court of General Sessions following his earlier arrest for brutally raping and robbing a Winthrop University student at gunpoint when he was sixteen years old. After accepting Tyler’s guilty pleas, the plea judge—the Honorable William A. McKinnon, circuit court judge—deferred sentencing to a later date. Thereafter, in August of 2021, a sentencing hearing was conducted in the matter, and, at

the conclusion of that hearing, the plea judge sentenced Tyler to an aggregate term of imprisonment of sixty years for his terrible crimes. Following that, Tyler unsuccessfully sought reconsideration of his sentence and then initiated an appeal. At present, Tyler's appeal is currently pending before this court.

II.

During Tyler's deferred sentencing hearing, several photographs and recordings were presented to, discussed with, and considered by the plea judge.¹ (Sent. Tr. pp. 8-11). However, those photographs and recordings were neither formally marked as exhibits nor admitted into evidence during the hearing. Nevertheless, because they were shown to the plea judge, they were unquestionably before the plea judge.

III.

Based on the issues raised and arguments and factual assertions made by Tyler on appeal, the State identified several of the recordings and photographs presented during the deferred sentencing hearing for inclusion in the Record on Appeal through its designation of matter. See Rule 210(c), SCACR (allowing for matter "presented to the lower court or tribunal" to be included in the Record on Appeal if properly designated for inclusion by any party). And, before doing so, the undersigned counsel for the State consulted with one of the solicitors involved in the prosecution of Tyler's case, received what were identified by the solicitor as true and accurate copies of the recordings and photographs presented to the plea judge during the sentencing hearing, and reviewed those items. Furthermore, in addition to that, the undersigned counsel for the State obtained an affidavit from Assistant Solicitor Christopher Epting—one of

¹ The portions of the record demonstrating recordings and photographs were presented to the plea judge during the sentencing hearing have been included with this return and motion as Attachment "1."

the attorneys from the Sixteenth Circuit Solicitor’s Office who represented the State during Tyler’s sentencing hearing—attesting to the accuracy of the provided copies of those recordings and photographs to the best of his knowledge and recollection. Notably, that affidavit along with copies of the designated recordings and photographs have been included as an attachment to the State’s return and motion for this Court’s review.²

IV.

Subsequent to the filing of the State’s designation of matter, Tyler filed a motion to strike through which he has asked this Court not to permit the designated recordings and photographs to be included in the Record on Appeal. As support for his motion, Tyler contends the designated matter should not be permitted to be included in the Record on Appeal because: (1) the items were not formally entered as exhibits during the deferred sentencing hearing and are not in the custody of the York County Clerk of Court; (2) four of the designated recordings are purportedly not viewable; and (3) the items—in his view—are not relevant and necessary to the issues he elected to raise on appeal.

V.

Regarding Tyler’s first contention, nothing in the South Carolina Appellate Court Rules precludes matter from being included in the Record on Appeal unless it was formally marked as an exhibit or admitted into evidence.³ Instead, our appellate court rules preclude the inclusion of

² Those items have been included as Attachment “2.”

³ As support for his contention items “must have been entered as exhibits at the lower court” before they can properly be included in the Record on Appeal, Tyler cites to this Court’s decision in State v. Hawkins, 310 S.C. 50, 425 S.E.2d 50 (Ct. App. 1992). (Motion to Strike, p. 2). In doing so, Tyler claims that decision indicated the appellate court had nothing to review on appeal “where the evidence was not marked for identification or made part of the lower court record[.]” (Motion to Strike, p. 2). Importantly though, that is *not* what this Court stated in Hawkins. Instead, in Hawkins, this Court found it could not address several appellate issues related to the exclusion of various items of evidence—including evidence that was, indeed,

matter “which was not *presented to the lower court or tribunal.*” Rule 210(c), SCACR (emphasis added). In the present case, Tyler readily concedes “the State played five videos (four surveillance videos and the responding officer’s body-camera video) and showed the sentencing court two photographs” of the victim in his motion to strike. (Motion to Strike, p. 2). Therefore, those recordings and photographs can, in fact, properly be included in the Record on Appeal based on the plain language of our appellate court rules since they were “presented to the lower court or tribunal” by virtue of being played for and shown to the plea judge. *Id.* Moreover, the contents of the recordings and photographs themselves coupled with the affidavit from the solicitor—an officer of the court—constitute compelling evidence of the authenticity of the designated recordings and photographs as the ones presented to the plea judge in Tyler’s case. *Cf. Rummage v. BGF Indus.*, 434 S.C. 441, 457, 865 S.E.2d 380, 389 (Ct. App. 2021) (“[A]s an officer of the court, we give credence to the veracity of that assertion.”), cert. dismissed as improvidently granted, 440 S.C. 307, 891 S.E.2d 374 (2023). Therefore, Tyler’s motion to strike should be denied.

VI.

Regarding Tyler’s second contention, all the recordings designated by the State are, in fact, playable because: (1) they—as reflected in the transcript from the circuit court proceedings—were played during the sentencing hearing for the plea judge; and (2) the

marked for identification purposes—not because it could not properly be included in the record on appeal but because none of it *actually was* included in the appellate record. *See State v. Hawkins*, 310 S.C. 50, 57, 425 S.E.2d 50, 54 (Ct. App. 1992) (“The court sustained an objection to the introduction and the pictures were marked for identification. They are not part of the appellate record. Therefore, this court has nothing to review.”); *id.* (“This court is unable to determine whether the exclusion of the video prejudiced Hawkins because the video was not made part of the appellate record.”); *id.* at 58, 425 S.E.2d at 55 (“Although they were marked for identification at trial, the records are not part of the appellate record and this court may not review the issue on appeal.”). Thus, the decision in *Hawkins* does not in any way actually support Tyler’s current contention despite his misleading suggestion to the contrary.

undersigned counsel for the State has played and personally viewed each one prior to designating them for inclusion in the Record on Appeal. And, in doing, the undersigned counsel for the State did not rely upon any “proprietary software” to play the recordings as Tyler suggests is required. (Motion to Strike, p. 3). Instead, the undersigned counsel for the State utilized VLC Media Player, a widely-used and free cross-platform multimedia player, to view each of the recordings, which are all formatted in the commonly-used MP4 file format. <https://www.videolan.org/vlc/>. Thus, contrary to Tyler’s claim, all the designated recordings can be viewed by using a “standard video player” and Tyler’s own regrettable technological issues do not—and should not be found to—constitute a legitimate reason to exclude matter presented to the plea judge from inclusion in the Record on Appeal. Again, Tyler’s motion to strike should be denied.

VII.

Turning to Tyler’s third contention, the facts of Tyler’s crimes are indeed relevant to the issues raised on appeal, and, in the State’s view, the designated recordings and photographs contain pertinent and relevant information about the circumstances of Tyler’s crimes that are not adequately reflected in the transcript alone, which is why the undersigned counsel for the State—consistent with the mandates of our appellate court rules—elected to designate that matter for inclusion in the Record on Appeal. See Rule 209(b), SCACR (permitting a party to designate “portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal” pursuant to the requirements of Rule 210(c) and further stating “[a] party shall not include any matter in his Designation which is not relevant to the appeal”). Meanwhile, in his motion to strike, Tyler even directly concedes “the facts of the underlying charges are relevant” to his appeal before nevertheless seeking the exclusion of the designated matter on the basis it—in his view and apparently without even having fully reviewed

it—is not “necessary.” (Motion to Strike, p. 3). Importantly though, necessity and relevancy—as this Court has previously instructed—are *not* synonymous, and, notably, nothing in our appellate court rules restricts the Record on Appeal to containing only matter that is absolutely necessary in the view of all parties. *Id.*; see *State v. Sweat*, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (Ct. App. 2004) (“Evidence is admissible if ‘logically relevant’ to establish a material fact or element of the crime; it need not be ‘necessary’ to the State’s case in order to be admitted.”). As a result, Tyler’s personal opinion on the *necessity* of the matter designated by the State does not constitute a legitimate ground for that matter to be excluded from the Record on Appeal. Once again, Tyler’s motion to strike should be denied.

VIII.

Beyond that, because the designated recordings and photographs—which have been included with the State’s return and motion as attachments to the solicitor’s affidavit—have properly been designated for inclusion in the Record on Appeal and are relevant to the resolution of Tyler’s appeal, the Record on Appeal cannot be properly completed without their inclusion. See Rule 210(c), SCACR (“The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267.”). Therefore, in order to enable the proper completion of the appellate record, the State asks this Court to allow the inclusion of the attached copies of the designated recordings and photographs obtained from the Sixteenth Circuit Solicitor’s Office in the Record on Appeal based on the solicitor’s sworn certification those items—to the best of his knowledge and experience—truly and accurately reflect the exhibits that were before the plea judge during the sentencing hearing conducted in Tyler’s case. Alternatively, in the event this Court believes more information is needed concerning the accuracy of those recordings and photographs, the State asks this Court to

remand the matter to the plea judge to allow him to reconstruct exactly what matter was presented to him during the sentencing hearing. Cf. Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) (“Where a transcript has been lost or destroyed, a court may remand to have the record reconstructed.”), overruled by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

WHEREFORE, Respondent prays the Court will deny Appellant’s motion to strike; allow the inclusion in the Record on Appeal of what are believed to be complete and accurate copies of the recordings and photographs presented to the plea judge in Appellant’s case; and remand for reconstruction by the plea judge in the event this Court believes more information is needed concerning the accuracy of those recordings and photographs; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General



By: _____
Mark R. Farthing
S.C. Bar Number 76901

December 27, 2023

ATTACHMENT 1

Sentence

1 Winthrop Police Department hiding in the shadows for fear
2 that her assailant, the defendant, will return and kill her
3 or someone else might find her and rape her again.

4 From the police department she goes to P.M.C. to get a
5 SANE kit done. During that time Terry Tyler was on a
6 joyride with his friends in her car.

7 Rock Hill P.D. tracks the defendant driving around
8 Charlotte for several hours using tag readers, and by
9 around 11:00 a.m. the car is spotted with the defendant in
10 the driver's seat with five of his friends in the car.

11 He is arrested, and he makes up a story that he
12 observed a homicide committed by, quote, Body Bag and that
13 Body Bag made him rape someone.

14 This story is so full of holes, but the detectives
15 still attempt to corroborate any part of this story. They
16 are unable to locate any homicide that matches the
17 description at all, but they are able to I.D. Body Bag, a
18 40-or-so-year-old man who is well known in the Rock Hill
19 area, and they speak to him, and he denies knowing who
20 Terry Tyler is.

21 Your Honor, I am now going to play some videos from
22 the investigation so that you can see for yourself:

23 THE COURT: Yes, ma'am.

24 MS. OHAYON: This first video is Emily pulling into
25 the Winthrop campus, Walk2Campus Apartments.

Sentence

1 MR. EPTING: Your Honor, can we publish these to the
2 screens in the courtroom?

3 THE COURT: Yes, sir, yeah.

4 Madam clerk.

5 (Pause.)

6 (Whereupon, the video was played for the Court.)

7 MS. OHAYON: The cameras turn on and off because there
8 are motion sensors. So I'm going to play different clips.

9 THE COURT: Ms. Ohayon, the screen behind you is not
10 working. Some people -- is it malfunctioning or -- it
11 looks like it may not be turned on. It's not showing
12 anything.

13 (Pause.)

14 THE COURT: Thank you, Counsel.

15 MS. OHAYON: This video shows Emily exiting from her
16 car, and you can see the defendant in the background by the
17 building. He is walking around waiting for someone.

18 There he is over -- where Chris is pointing with the
19 mouse.

20 This video speaks for itself, Your Honor.

21 He takes her to that door originally, but there's
22 apartments behind it. So he takes her out the front. That
23 other door is not an exit.

24 And I do just want to point out one more time, Your
25 Honor, the way he grabs her, points the gun right in her

Sentence

1 face, how she's completely tense. And when he turns around
2 he catches the camera and then looks down to hide his face.

3 The next video you'll see is you'll see him coming
4 right from where he was waiting for her before, right
5 there, and then he's going to come to her car.

6 At this time Ms. Peters is walking nude completely
7 from her waist down down the tracks.

8 she ends up walking to Winthrop Police Department, and
9 this is the first responding officer's body cam.

10 Your Honor, I'm not sure if you can make the volume
11 any louder. It's as loud as possible on my computer.

12 THE COURT: Looks like it's as loud as we can get it
13 on this one too.

14 MS. OHAYON: Okay.

15 THE COURT: Let's pause it for a moment.

16 Is there a master volume maybe that we can turn up?

17 (Pause.)

18 MS. OHAYON: Apologize, Your Honor.

19 THE COURT: That's okay. Let's try it. Let's try it
20 again.

21 MS. OHAYON: Your Honor, the rest of that video they
22 just are trying to get more information about the -- at
23 that time just the suspect, and eventually E.M.S. arrives
24 and then she's taken to the hospital for her SANE kit,
25 which at the hospital she tells a story in more detail.

Sentence

1 (Whereupon, the video was played for the court.)

2 MS. OHAYON: That concludes the videos I'd like to
3 show Your Honor.

4 There are also photos that were taken of the victim
5 during the same process. One is not coming out clear, but
6 that's just a red abrasion on her head from where he hit
7 her with the pistol. You can see that her hands are still
8 dirty from when he made them -- made her put her hands down
9 on the tracks, and her knees and the gravel.

10 A little bit about the investigation. First, Rock
11 Hill P.D. did an amazingly thorough job investigating this
12 case, and I want to thank everyone who helped with it for
13 their hard work and diligence.

14 Every officer who assisted with the case handled it
15 with such professionalism. There isn't a single officer or
16 witness, for that matter, that did not recall this case
17 when we called them for trial prep, and they all worked so
18 hard to help find the defendant that morning.

19 Each officer we prepped expressed passion for the case
20 and sympathy for the victim, and their compassion and
21 dedication to their work showed through in this case, and
22 it's truly a blessing to be able to prosecute a thoroughly
23 investigate a case like this.

24 It is because of their hard work that this defendant
25 is off the streets and no longer committing crimes against

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SC Court of Appeals

ATTACHMENT 2

STATE OF SOUTH CAROLINA
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Appeal from York County
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Respondent
SC Court of Appeals

THE STATE,

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TERRY SHAIMEK TYLER,

Appellant.

AFFIDAVIT

Personally appeared before me, Christopher Epting, who being duly sworn, attests to the following:

I.

I am an Assistant Solicitor in the Sixteenth Judicial Circuit Solicitor's Office.

II.

I served as one of the prosecutors for the State of South Carolina in Appellant Terry Shaimek Tyler's case. Additionally, I was present during the sentencing hearing conducted on August 16, 2021, in Appellant's case, including when several recordings and photographs were presented to, played for or shown to, and discussed with the plea judge.

III.

Neither the above-referenced recordings nor photographs were marked as exhibits or formally admitted into evidence during the sentencing hearing. However, the above-referenced

recordings and photographs were nonetheless before the plea judge during the circuit court proceedings. Furthermore, the above-referenced recordings were referenced in the transcript from the sentencing hearing on pages 8, 9, and 10, and the photographs were referenced in the transcript from the sentencing hearing on pages 11.

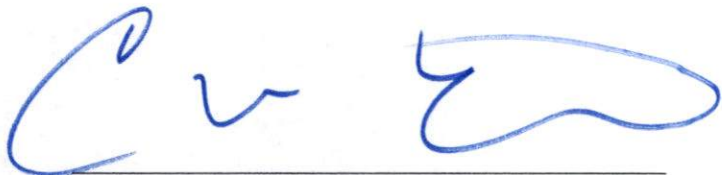
IV.

Exact copies of the above-referenced photographs that were presented to, shown to, and discussed with the plea judge in Appellant's case has been included with this affidavit as Attachment "A". Likewise, exact copies of the above-referenced recordings that were presented to, played for, and discussed with the plea judge have been included with this affidavit on a disc as Attachment "B".

V.

To the best of my knowledge and experience, the included exhibits identified as Attachment "A" and Attachment "B" truly and accurately reflect the exhibits that were before the plea judge during the circuit court proceedings in Appellant's case.

WHEREFORE, the undersigned hereby certifies that the above is true to the best of his knowledge and recollection. I have this day been provided a copy of this Affidavit and hereby acknowledge receipt thereof.



CHRISTOPHER EPTING
Assistant Solicitor, Sixteenth Judicial Circuit

SWORN to before me this 18 day of December, 2023.



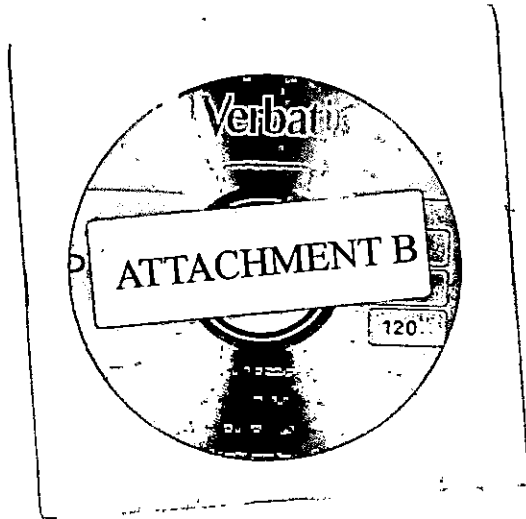
Notary Public for South Carolina
My Commission Expires: 3-15-27



ATTACHMENT A







STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable William A. McKinnon, Circuit Court Judge
Appellate Case No. 2021-001316

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SC Court of Appeals

THE STATE,

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vs.

TERRY SHAIMEK TYLER,

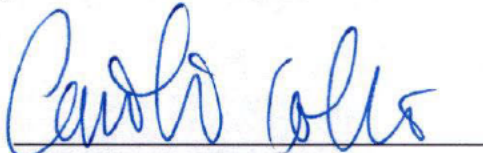
Appellant.

PROOF OF SERVICE

I, Caroline Collins, certify I have served the within Return to Motion to Strike and Motion to Either Permit the Inclusion of Copies of Exhibits in the Record on Appeal or Remand for Reconstruction by delivering a copy to the office of the following individual:

Jessica M. Saxon, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify all parties required by Rule to be served have been served.
This 27th day of December, 2023.



CAROLINE COLLINS
Administrative Coordinator
Office of the Attorney General