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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Honorable Steven H. DeBerry IV, Circuit Court Judge
Appellate Case No. 2023-001182

THE STATE,

Respondent,

vs.

ANTONIO DENON BRAYBOY,

Appellant.

RESPONDENT'S REPLY TO APPELLANT'S RESPONSE IN OPPOSITION TO MOTION TO STRIKE AND REQUIRE FILING OF AMENDED INITIAL BRIEF OF APPELLANT

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

I.

In October of 2020, Appellant Antonio Denon Brayboy was arrested following an investigation into the murder of Rashad Jones and charged with murder and possession of a weapon during the commission of a violent crime. In December of 2020, the Florence County Grand Jury indicted Appellant for murder and possession of a weapon during the commission of a violent crime. On July 17-20, 2023, a jury trial was commenced in the Florence County Court of General Sessions with the Honorable Steven H. DeBerry IV, Circuit Court Judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted, and the trial judge sentenced him

to 50 years for murder and 5 years for possession of weapon during the commission of a violent crime. Appellant then timely initiated an appeal, which is currently pending before this Court.

Appellant filed his Initial Brief on February 29, 2024, raising three issues. In his brief, Appellant relies on an unpublished opinion, in violation of Rule 268(d)(2) SCACR, to support his argument regarding Issue I and additionally fails to abide by proper formatting as designated in Rule 267(c) and (d) SCACR throughout the entirety of the brief. Respondent previously motioned to strike Appellant's initial brief on August 14, 2024, requesting that the Court require Appellant to submit an amended brief that properly comports with the South Carolina Appellate Court Rules.[1] Appellant submitted a return to Respondent's motion on September 3, 2024. In reply, Respondent will show this Court the following:

II.

In his Return to the State's Motion to Strike and Require the Filing of an Amended Brief, Appellant now argues that reliance on the unpublished opinion in *State v. Gibbs*[2] was meant to support the arguments made at trial. Even so, simply because Appellant improperly argued at trial that the unpublished opinion in *Gibbs* is controlling authority, that does not allow him to cite to the unpublished opinion in *Gibbs* on appeal. Rule 268(d)(2) SCACR. In fact, at the top of the unpublished opinion it states this opinion has no precedential value and should not be cited except as allowed in Rule 268(d)(2).

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[1] Appellant makes note of Respondent's extension requests to file the initial brief. Respondent's extension requests have no bearing on the substance and invalidity of Appellant's brief as Appellant has failed to act in accordance with the South Carolina Appellate Court Rules. Regardless, this Court is well aware that Respondent's extensions are due to Respondent's heavy workload in state and federal court.

[2] *State v. Gibbs*, Unpublished Opinion No. 2020-UP-244.

However, Appellant does not merely refer to trial counsel's improper reliance below as precedential authority on an unpublished opinion in the initial brief but again relies on the *Gibbs*' unpublished opinion to support a similar finding in this case before this Court. This is a violation of the Rule. Rule 268(d)(2) SCACR provides that "Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." In his Return, Appellant essentially argues that the Appellate Court Rules should not apply to him, as if he should be given some special exception under Rule 268. This is not a proper basis to overcome the "Motion to Strike and Require the Filing of an Amended Brief." Respondent's Motion should be granted.

Appellant argues that the arguments made at trial directly relate to the findings in *Gibbs*, thus citation and reference to *Gibbs*, though unpublished and without precedential value, should be permitted to address the circumstances of Appellant's case. Such an analysis of Rule 268(d)(2) SCACR is a misconstruction of the Rule's intent. Similar factual circumstances do not warrant use of an unpublished opinion.[3] Rule 268(d)(2) SCACR. In *Hodge v. UniHealth Post-Acute Care of Bamberg*, this Court addressed *the circuit court's* examination of an unpublished opinion in reference to support of the appellant's argument:

> But as the circuit court noted, this was an unusual situation in that some of the same parties were making the same arguments in a case with similar facts. Additionally, the circuit court did not rely solely on the *Scott* opinion [the unpublished opinion] to make its decision. It also relied on the published opinions of *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), and *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014)—both of which we discuss below—as well as other cases involving agency or arbitration.

[3] The facts in *Gibbs* are not overwhelmingly similar to Appellant's case. In fact, Appellant uses *Gibbs* to argue that the warrant and affidavit were insufficient to demonstrate that probable cause existed to obtain a search warrant – such legal issues are not so unique that the only case addressing the issue is one without precedential value and Rule 268(d)(2) SCACR prohibits such citation. In fact, it simply underscores the lack of meritorious value of Appellant's argument.

> Further, this court in *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), *cert. denied*, S.C. Sup. Ct. Order dated Dec. 2, 2016—a published opinion filed after the circuit court's ruling—also reached the same decision as in *Scott*, relying on the same principles. Accordingly, even if the circuit court did err in referencing the *Scott* opinion, any error would not be reversible because it was not prejudicial. *See Visual Graphics Leasing Corp.*, 311 S.C. at 489, 429 S.E.2d at 841 ("An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant.").

Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 555-556, 813 S.E.2d 292, 298 (Ct. App. 2018). Such is not the case here. This is not an unusual situation where the same parties are making the same arguments in a case with similar facts. Furthermore, the unpublished opinion may not be cited in the brief because unpublished opinions may not be cited except "in proceedings in which they are directly involved." Rule 268(d)(2). If Appellant's argument were accepted, the Rule would be swallowed by simply arguing an unpublished opinion below in the Circuit Court. That is not what the Rule states. Rule 268(d)(2)(unpublished opinions should not be cited except "in proceedings in which they are directly involved.").

Appellant also contends because *Gibbs* relies on the precedent established in *Carpenter v. United States*[4] and that because the facts in *Gibbs* are similar to those of this case, that Appellant should be permitted to cite and rely on the findings in the unpublished opinion in *Gibbs*. If this argument were accepted, then any unpublished opinion that cited precedential authority would be excepted from Rule 268(d)(2). Again, the Rule would be gutted. Not only is the use of the unpublished opinion in *Gibbs* unjustifiable as to factual circumstances, as identified above, but Appellant's arguments rely on the holdings of *Carpenter*, and such citation to *Gibbs* is unnecessary, improper, and in violation of Rule 268(d) SCACR. Appellant may cite to *Carpenter* or any other

[4] *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018). Appellant cites "*State v. Carpenter*" in his Return, however Respondent assumes Appellant intended to reference *Carpenter v. United States* and will continue to refer to *Carpenter* in that manner.

published precedential authority in his Amended Brief, but he cannot rely on an unpublished opinion and argue it as precedent. Rule 268, SCACR. Appellant is simply not bigger than the Rule.

III.

Appellant contends that the unpublished opinion in *Gibbs* must be discussed upon appellate review because the arguments made at trial relied on *Gibbs*. At trial, Appellant argued that the court should exclude all evidence collected based on the alleged insufficient warrant, comparing the facts and findings from *Gibbs* and its application of *Carpenter* to this case. Such reliance on an unpublished opinion as precedential authority is simply improper – at trial and on direct appellate review. Further, while the trial court considered Appellant's argument and reviewed *Gibbs*, the court ultimately found the warrant to be sufficient in contrast to the holding in *Gibbs*. (Tr. 78-80)(Attachment I.). As such, there is no ascertainable reason which would entitle Appellant to cite or reference the unpublished opinion in *Gibbs*, as the trial court properly ruled against *Appellant's argument relying on an unpublished opinion*, and Appellant conceded that his argument is based upon the precedent **cited within** *Gibbs*.

If this Court strikes Appellant's initial brief, Appellant contends that the analysis should be allowed as it was the analysis argued at trial and considered by the trial judge in making his ruling. Again, any argument or reliance on the unpublished opinion in *Gibbs* as precedential authority, whether at trial or on appellate review, is improper. Mere mention of the trial court's ruling is not improper. Respondent does not take issue with reference or citation to *Carpenter* or any case law with precedential value. Appellant is simply not permitted to argue or rely on the findings of an unpublished opinion or cite to the same as precedential authority to the trial court or to this Court or argue that this Court should or must follow an unpublished opinion. Rule 268(d)(2) SCACR.

An unpublished opinion is specifically limited to the facts of that case involved and holds no precedential authority, hence the reason for the Rule. If Appellant's argument were accepted, Rule 268(d)(2), SCACR, could be gutted merely by trial counsel improperly arguing an unpublished opinion to the trial court as precedential authority. The trial court did not base its' ruling off of *Gibbs* and in fact, declined *Gibbs*' application to Appellant's case. (Tr. 78-80). Regardless, the unpublished opinion in *Gibbs* should not have been considered, nor should it have been relied upon in argument initially as precedent. Simply put, reference and reliance on unpublished opinions with no precedential value as precedential authority is in violation of the South Carolina Appellate Court Rules, and Appellant in his Return has failed to show that an arguable applicable exception, if any, should apply to him.

Furthermore, Respondent cannot overlook Appellant's repeated reliance on the unpublished opinion in *Gibbs* in his present brief; and, it would require Respondent to address the unpublished opinion in *Gibbs* in its brief as Respondent has had to do in its Motion to Strike and in this Reply. For this reason as well, the Motion to Strike and Require Filing of an Amended Brief should be granted.

IV.

In reply to Appellant's assertion that "scrivener's" errors do not invalidate the brief itself, Appellant simply disregards the proper formatting of briefing as required by our appellate courts. Rule 267(c) SCACR specifically provides that "Type size shall be standard 12-point or larger and double spaced on white bond paper of not less than twenty-pound weight, 8 1/2 inches by 11 inches" and Rule 267(d) provides that "Typewritten papers or reproductions must have a blank margin of one inch on all sides."

Appellant's brief does not merely contain typographical errors or misspellings, which Respondent has not complained of but has consistent formatting issues throughout the entirety of the brief in violation of the SCACR. Despite Appellant's contention that such errors are trivial, our Supreme Court has made clear that the Appellate Court Rules are not mere technicalities. *See Henning v. Kaye*, 307 S.C. 436, 437 415 S.E.2d 794 (1992). Respondent again emphasizes the warning in *Henning*, that '[i]t is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review." *Id.* Respondent submits Appellant's formatting issues are not mere scrivener's errors, which Respondent has ignored, but failures to comply with basic requirements of the South Carolina Appellate Court Rules regarding formatting. This Court should grant the Motion to Strike the present brief and require the filing of an Amended Brief.

WHEREFORE, having made a Reply to Petitioner's Return to the Motion to Strike and Require the Filing of an Amended Brief, the State moves this Court to strike Appellant's appellate brief as presently filed that contains reference to an unpublished opinion, which Appellant relies upon in support of his argument as to Issue I; require proper formatting as required by Rule 267 of the South Carolina Appellate Court Rules; hold the time period for service and filing of the Initial Brief of Respondent and Designation of Matter in abeyance pending a ruling on this motion and the filing of the Amended Brief; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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By: *s/J. Anthony Mabry*

J. ANTHONY MABRY
ATTORNEYS FOR RESPONDENT

September 6, 2024.

I'm asking the Court to quash the warrant, Judge, as being, obviously, deficient. It is extremely deficient. It's not just a matter of being, you know, somewhat deficient. It doesn't even meet the standards that are placed in Gibbs, and the Court would never even get to the analysis before it would overturn this case, Judge.

Thank you so much.

THE COURT: All right. Let me take about a five- or ten-minute recess to read this case, and I'll certainly come out and let you know my ruling, and then we'll hear the rest of the motions. All right?

MR. WILSON: Thank you, Your Honor.

MR. WHITE: Thank you, Judge.

(A recess was taken from 2:55 p.m. to 3:08 p.m.)

THE COURT: All right. Anything before we resume?

MR. WHITE: No, sir, Judge.

MR. WILSON: Nothing, Your Honor.

THE COURT: So the Court -- I mean, when I considered what was before the Court here with the suppression motion and cell phone records from the defendant, I certainly harken back to the situation at hand that law enforcement found theirselves in, in the early stages of this investigation whereby they had the victim's cell phone records that showed what was placed in the affidavit of the warrant, that the victim talked to or

at least had -- or at least these two cell phones had contact with each other shortly prior to the crime that was committed.

And certainly when an investigator or a law enforcement officer seeks a warrant to search whatever the premise or the object may be, there must be probable cause that would lead to evidence of the crime that's been committed.

So -- and, I mean, I find, even in reading the Gibbs case, just to quote from the Gibbs case, because the affidavit did not allege Gibbs committed any crimes, Gibbs then argues that there can be no assertion that the affidavit stated that there was a fair probability that evidence of a crime would be found if the warrant was issued.

And I think that's the -- I think that goes to the heart of this issue. You know, they knew that a murder occurred or at least a homicide occurred. They knew that these phones that were related, at least to the victim at the time, communicated with each other. I believe the affidavit contains probable cause that would lead to the evidence of or the exclusion of evidence of the commission of the crime.

And so, you know, certainly what Investigator Edwards testified to, which he might have supplemented,

you know, I don't think it's needed at this point for this warrant, and the issue as to whether or not it was supplemented before or after the issuance of this warrant is not material to my ruling. I believe the affidavit contained within the search warrant is sufficient and contains probable cause for what was sought at the time, and so I'm going to respectfully deny your motion. All right?

Is there any questions about that?

MR. WHITE: No, sir, Judge.

And then moving on, the defense did make a motion to suppress evidence based on fruit of the poisonous tree. I think that one, subsequent to your ruling, would also be denied.

There are some other motions made that I can clear up. There's a motion to provide copies of each witness's NCIC. My paralegal was working on that. I think she's got all those printed. I'll have those first thing in the morning to give to the defense. That's no problem.

Motion for pretrial disclosure of State's witness list. I have turned over that, Judge.

Motion to sequester witnesses, Judge. I don't have -- generally, I don't have a problem with that. I mean, obviously, I know the defense is entitled to that. However, I would ask, because the victim, Rashad Jones,

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PROOF OF SERVICE

I, J. Anthony Mabry, attorney for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Reply to Appellant's Response in Opposition to Motion to Strike and Require filing of an Amended Initial Brief of Appellant, with attachment, has been forwarded to Appellant's counsel, Ralph James Wilson, Jr., Esq. and to Lauren K. Anderson, Esq. via email today, September 6, 2024 to attorney@ralphwilsonlaw.com.

I further certify that all parties required by Rule to be served have been served.

This 6th day of September, 2024.

s/ J. Anthony Mabry
J. ANTHONY MABRY
Senior Assistant Attorney General