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Oct 03 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
The Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ANTHONY NICHOLAS ARGOE,

APPELLANT.

Appellate Case No. 2023-000223

MOTION FOR RECONSIDERATION

Appellant's sole issue on appeal attacks Judge Murphy's ruling regarding whether appellant would be represented by counsel or represent himself. In anticipation of submitting an Initial Brief of Respondent that relies, in large part, on the fact of emails between defense counsel and Judge Murphy regarding Judge Murphy's ruling, the State sought a ruling that the emails would be accepted for inclusion in the record on appeal.[1] Appellant – again the party seeking relief – did

[1] *See generally* Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 261 (2d ed. 2002) (recognizing the more "prudent" approach is to submit such a motion after designations are known observing, "if the motion is not made until the record is printed, there is an unnecessary waste of time and expense in having to amend the record on appeal"). *See also* Rule 209 (a), SCACR ("... the Designation may only propose to include portions of the ... materials which may be properly included in the Record on appeal...."). Since the State was already aware the appellant would object, the State filed at the first opportunity.

not consent to the emails being including in the record.[2] On September 30, 2024, this Court denied the motion. As that order demonstrates several misapprehensions both in fact and law and would lead to an unjust result, the State respectfully requests rehearing. *See* Rule 240 (i), SCACR.[3] The State respectfully presents these discrete points for consideration:

1. The order appears to accept appellant's position that the emails (which are again attached here) "were not 'presented to the lower court' as required by Rule 210(c)...." (Order, p. 1). That is incorrect. The emails constitute communication *with the court.* Rule 210(c), SCACR contemplates presentation as necessary when the matter is not otherwise available or known to the Court. The very next line following the "presentation" requirement allows, among other things, orders and other decisions to be included in the record. These items are clearly not items "presented" to the judge. Read carefully, the limitation to items "presented" is to ensure that the parties and the circuit court do not fall victim to sandbagging. It is a misuse of the Rule to allow an appellant to avoid his own actions before the circuit court, particularly an action that undermines his position on appeal.

2. In that same vein, this Court erroneously cites to precedent that requires arguments to be preserved before being raised on appeal. (Order, pp. 1-2). The effect of the ruling: this Court has turned a shield into a sword. Moreover, the precedent is geared toward an appellant's duty to

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[2] Appellant did not object to a remand *so that he could add* to the fact of these emails. However, the State just sought to rely *on the fact of the emails.* This tends to again support the State's position that the emails between court and counsel alone undermine the very issue appellant presents on appeal. Otherwise, he would not have to attempt *to go outside the record* to blunt the probative force of the emails.

[3] Rehearing is generally not allowed "on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal." Rule 240(i), SCACR. The order appears to prohibit reliance on a key portion of the material before the lower court showing (1) the ambiguity of appellant's own statements regarding his intent to request to represent himself, and (2) that appellant intentionally abandoned his request to have Judge Murphy revisit the ruling. This essentially decides the appeal (with appellant blocking material that would allow fair response) resulting in an unjust windfall. Therefore, rehearing is not barred.

make a record for appeal. *See, e.g., Germain v. Nichol*, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983) ("[An a]ppellant has the burden of providing this Court with a sufficient record upon which this Court can make its decision."). The reverse is not true. The appellant cannot block from this Court material not just before the lower court *but from the Court* with a hope to establish error and prejudice based on an incomplete record. *See* Rule 210(h), SCACR (without supplementation, "the appellate court will not consider any fact which does not appear in the Record on Appeal").

3. This Court had the transcript from the September 16, 2022, hearing before Judge Murphy as attachment to the motion. A summary of salient facts was also included in the motion and is presented again in limited manner here:

- July 25, 2022, motion to relieve counsel based on failure to obtain and provide discovery; counsel asserted relevant discovery materials were obtained and provided; Judge Goodstein denied the motion

- September 16, 2022, motion to relieve counsel or represent himself based on complaints of failure to obtain and provide discovery; counsel again asserted discovery had been provided to appellant; Judge Murphy questioned appellant on his knowledge of the law and advised self-representation was not wise and he may wish to retain counsel; appellant indicated an interest in retaining counsel and asserted he would look into it; Judge Murphy denied the motion

- January 19, 2023, appellant made a motion to Judge Goodstein to represent himself; defense counsel stated after consultation with appellant, appellant wanted to raise the issue again, and counsel believed to preserve the issue, he needed to raise the issue again before trial; Judge Goodstein refers the matter to Judge Murphy to treat as a motion to reconsider

- The jury trial began February 6, 2023.

What the email *from the court* confirmed is that a hearing on January 30, 2023, *was scheduled at defense counsel's request* then *intentionally abandoned by appellant.* (Attachment 1). This is important considering the back and forth evidence in the record on appellant's desire

to remove counsel and potentially represent himself, and especially so in light of what appears to be ambiguity at the September 16, 2022. At that point, appellant was faced *with a December 2022* trial. He said he would look into hiring counsel:

> THE DEFENDANT: ... If I hire an attorney, there might not be time for him to get acclimated with the - - with the case.
>
> THE COURT: No, sir. That's not going to happen. Your case is already scheduled for trial December the 12th. So if you hire an attorney, they're going to have to be ready by then or you can stay with Mr. Chisolm.
>
> THE DEFENDANT: **Well, I'll look into it then.**
>
> THE COURT: All right, sir. If you are able to hire an attorney, make sure that they contact the Court and that they absolutely know that they're ready for trial December the 12th.
>
> Otherwise, your motion to relieve Mr. Chisholm is denied. I don't - - believe that you need representation in this matter. In looking out for your best interest as far as properly preparing and being able to defend yourself, I do believe that you need representation in this matter. If you can hire somebody, you're certainly free and able to do so....

(Tr. pp. 9-10) (emphasis added).

"The right to proceed *pro se* must be clearly asserted by the defendant prior to trial." *State v. Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). The ambiguity appellant placed before Judge Murphy undermined a finding that a desire for self-representation was "clearly asserted," regardless of whether Judge Murphy thought self-representation was a good idea or not.[4] Further,

[4] Of course, no one would seriously challenge that in general self-representation does not lead to the best result for most defendants. *See, e.g., Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017) (observing that a "defendant's right to conduct his own defense ... when exercised, 'usually increases the likelihood of a trial outcome unfavorable to the defendant.'") (quoting *McKaskle v. Wiggins,* 465 U.S. 168, 177, n. 8 (1984)). The question is whether an unambiguous request followed by a knowing waiver is denied based on a paternalistic view of what is better for the defendant. *See State v. Brewer*, 328 S.C. 117, 492 S.E.2d 97 (1997). Here, the ambiguity in the mix along with intentional abandonment of a later hearing goes to the first require: a clear request.

appellant apparently wished to renew his request before his then *later February trial date* but *decided not to do so after a hearing was scheduled on the motion.* This is appellant's failing, not Judge Muphy's. The lower court should not be reversed on an ambiguous matter not clearly raised then ultimately intentionally abandoned. Yet the critical support for his intentional abandonment to make clear a desire for self-representation is blocked by the Court's order of September 30, 2024. That undermines fair representation of the facts below, which are undisputed. A motion to reconsider Judge Murphy's prior September ruling was scheduled before Judge Murphy in January, shortly before trial, and appellant, with the assistance of counsel, knowingly, intelligently, and voluntarily withdrew the motion obviating the need for the scheduled hearing. Further, pursuant to the Rule, this Court can request a Report from Judge Muphy regarding appellant's withdrawal of the motion to reconsider below. This Court should reconsider the ruling.

4. Because this matter must be resolved before the Initial Brief of Respondent may be completed (again, as the State intends to rely heavily on the above argument), the State also requests this Court hold the timelines for filing the Initial Brief of Respondent in abeyance and, on disposition of this motion for reconsideration, allow 30 days in which to complete the Brief for filing.

Respectfully Submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY
Senior Assistant Attorney General
S.C. Bar No. 11973

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(803) 734-6305

By: s/*J. Anthony Mabry*
J. ANTHONY MABRY
ATTORNEYS FOR RESPONDENT

October 3, 2024.

ATTACHMENT NO. 1

Anthony Mabry

From: Ash Chisholm <ashc@1stcircuitpd.com>
Sent: Monday, August 12, 2024 4:10 PM
To: Anthony Mabry
Subject: Fw: Anthony Argoe Hearing Jan 30th

From: Ash Chisholm
Sent: Thursday, January 26, 2023 9:13 AM
To: Murphy, Maite Law Clerk (Alan G. Lee) <mmurphylc@sccourts.org>
Cc: David L. Osborne <DOsborne@dorchestercountysc.gov>
Subject: Anthony Argoe Hearing Jan 30th

Judge Murphy,

We are scheduled to appear before you in Orangeburg on January 30th at 4 pm. After speaking with my client, we are withdrawing our motion to reconsider your prior ruling on his motion to represent himself.

Ash

Anthony Mabry

From: Ash Chisholm <ashc@1stcircuitpd.com>
Sent: Wednesday, August 14, 2024 10:39 AM
To: Anthony Mabry
Cc: Dudek, Robert
Subject: Fw: Anthony Argoe Hearing Jan 30th

All,

This is the only correspondence I could find about this following my initial email withdrawing the motion to reconsider.

Ash

From: Murphy, Maite Law Clerk (Jewell Gearding) <mmurphylc@sccourts.org>
Sent: Thursday, January 26, 2023 9:26 AM
To: Ash Chisholm <ashc@1stcircuitpd.com>
Cc: David L. Osborne <DOsborne@dorchestercountysc.gov>; Tonda Westbury <TWestbury@dorchestercountysc.gov>
Subject: RE: Anthony Argoe Hearing Jan 30th

Yes, I will reach out to Orangeburg as well.

From: Ash Chisholm <ashc@1stcircuitpd.com>
Sent: Thursday, January 26, 2023 9:24 AM
To: Murphy, Maite Law Clerk (Jewell Gearding) <mmurphylc@sccourts.org>
Cc: David L. Osborne <DOsborne@dorchestercountysc.gov>; Tonda Westbury <TWestbury@dorchestercountysc.gov>
Subject: RE: Anthony Argoe Hearing Jan 30th

No I haven't. I'm CC'ing Tonda on here so hopefully that will sort it out. I'm guessing you mean our Dorchester Clerk for docket/record purposes?

Ash

From: Murphy, Maite Law Clerk (Jewell Gearding) <mmurphylc@sccourts.org>
Sent: Thursday, January 26, 2023 9:21 AM
To: Ash Chisholm <ashc@1stcircuitpd.com>
Cc: David L. Osborne <DOsborne@dorchestercountysc.gov>
Subject: RE: Anthony Argoe Hearing Jan 30th

Good Morning,

Have you reached out to the clerk about this so they know what to do with the roster?

From: Ash Chisholm <ashc@1stcircuitpd.com>
Sent: Thursday, January 26, 2023 9:13 AM
To: Murphy, Maite Law Clerk (Jewell Gearding) <mmurphylc@sccourts.org>
Cc: David L. Osborne <DOsborne@dorchestercountysc.gov>
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PROOF OF SERVICE

I, **Donna D'Alessio**, an employee of the Respondent and legal assistant to J. Anthony Mabry, of counsel for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Motion for Reconsideration has been forwarded to Appellant's counsel, Robert M. Dudek, Esq., Esq., via email today, October 3, 2024 to RDudek@sccid.sc.gov and to his assistant at kwarren@sccid.sc.gov.

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

This 3rd day of October, 2024.

s/ Donna D'Alessio
Donna D'Alessio, Legal Assistant to
J. Anthony Mabry
Senior Assistant Attorney General
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