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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas
Marvin H. Dukes, III, Circuit Court Judge

Ticket No. 2023-01-901-72065
Intermediate Appellate Case No. 2023-CP-07-01829

Appellate Case No. 2024-000929

BENJAMIN J. HAYS,.....APPELLANT,

v.

STATE OF SOUTH CAROLINA,.....RESPONDENT

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

APPELLANT'S RESPONSE TO RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. All of Respondent's statement of issues on appeal ignores the Respondent's stipulation and puts forth arguments in contravention of those stipulations. On this basis, Appellant contends Respondent's arguments are waived and should not be considered. Specifically addressing each argument, Appellant responds as follows:

2. Appellant could not waive an issue for which he secured Respondent's stipulation and when he realized Respondent was arguing in contravention of that stipulation raised the issue to the Court he was then arguing before. Because the issue of an incomplete record was not waived, it was error for the circuit court to deny Appellant's request for a new trial where meaningful appellate review was prevented. Appellant preserved his argument and it was not abandoned as conclusory.

3. The circuit court was not under any obligation to list "every fact," but was under an obligation to list material facts, which stipulated facts would constitute.

4. The circuit court erred in affirming the trial court's denial of Appellant's motion for a directed verdict and rejecting Appellant's claim that he had legal cause or good excuse to trespass by relying in part on evidence that Appellant's wife could and did in fact respond to the location because when Respondent argues it demonstrated (1) Appellant had reasonable alternatives for getting his golf card registered, and (2) it constituted substantial evidence reasonably tending to prove Appellant's guilt, that was in contravention of Respondent's stipulation that "there was no mechanism for Appellant's golf cart to be inspected other than to transport it to the Offices."

5. The circuit court erred in affirming the trial court's denial of Appellant's motion for directed verdict and rejecting Appellant's claim that he had "legal cause or good excuse" to trespass simply where, in response to an email announcing his intent to appear and register his golf cart, a staff member of the premises "failed to inform" Appeallant he cold not, when there was direct and circumstantial evidence to the contrary.

APPELLANT'S RESPONSE TO RESPONDENT'S STATEMENT OF THE CASE

Appellant agrees with Respondent's statement of the case except as to the following:

1. Footnote 1, Respondent states "Despite this declaration, the State has now obtained a certified true copy of the audio recording from the Clerk of the Magistrate Court. The recording was the subject of the State's October 9, 2024 motion to hold this appeal in abeyance and the Court's October 22, 2024 order granting that motion for the parties to explore obtaining a transcript. After receiving a recommendation from the State, Counsel for Mr. Hays ultimately communicated with a retired court reporter regarding a possible transcription of the September 26, 2023 trial. She listened to the entire recording and has now advised that the quality is so bad in areas that she does not think she would be able to prepare a sufficient transcript."

2. In response, Appellant would state that he did not have the certified copy of the recording referenced by the State and not one, but two independent court reporters were asked to prepare a transcript and both independently stated one could not be prepared. Additionally, the second court reporter was recommended by the State. Finally, the first reporter's position was known to the State at the time the stipulations were agreed to. To the extent the State desired to pull portions of the trial record from a certified recording, nothing prevented the State from doing so and the State affirmed its position to proceed with the hearing notwithstanding the lack of a transcript.

APPELLANT'S RESPONSE TO RESPONDENT'S STATEMENT OF THE FACTS

Appellant agrees with Respondent's statement of the facts except as to the following:

1. Respondent argues facts that are outside its stipulation to confine the record to the Magistrate's Return and stipulated facts. See Initial Brief of Respondent, page 6. As such, these facts should not be considered.

2. The most egregious examples that are completely inconsistent to the Respondent's stipulation are as follows:

a. Its argument that at trial, it was established "if Appellant wanted his golf carts inspected, they would make arrangements with him so as not to cause a scene at the office. McCarter testified Appellant had been instructed to get his golf cart inspected at a different location." Id., paragraph 2. Compare to the fifth stipulation between the parties: "there was no mechanism for Appellant's golf cart to be inspected other than to transport it to the offices." *Transcript*, p. 4, ll 18-23.

b. Its argument that at trial, it was established "Gonzales explained the POA rules would not permit an inspection if there was any balance owed to the POA so that when the front desk checked the computer and advised Appellant had a $17 balance, he confirmed the rule with the POA general manager and then advised Appellant he could not conduct the inspection requested . . . Gonzales testified that when he told Appellant the golf cart could not be inspected Appellant got mad and began cursing." Initial Brief of Respondent., p. 7, paragraph 1. Compare with third stipulation between the parties: "Appellant had no balance due to the HOA as of June 27, 2023, thus there was no barrier to the golf cart being inspected" *Transcript*, p. 4, ll 18-23.

c. Its argument that at trial "Horne testified that Appellant's wife arrived to pick up the golf cart shortly after Appellant was arrested. Horne explained this meant Appellant had someone else who could have brought the golf cart in for the inspection instead of brining it himself" Initial Brief of Respondent, p. 8, paragraph 1.

ARGUMENT

I. Respondent incorrectly argues that the issue of an incomplete record was waived and even if not waived, the Circuit Court properly denied Appellant's request for a new trial because he failed to establish prevention of conducting meaningful appellate review. Respondent also incorrectly argues Appellant abandoned this argument.

Respondent argues Appellant waived any complaint he may have had about the sufficiency of the record when he elected to proceed with his appeal to a ruling on the merits, rather than moving for an immediate remand to "reconstruct the record" either at the hearing or as soon as he believed "facts outside the magistrates" return and stipulation of facts was being argued. Initial Brief of Respondent at 9.

As to this argument, first, Appellant raised the issue of a new trial at the hearing. *Trascript*, p. 5, ll 2-7 and p. 15, ll 20-25 and 3.20.24 email. Appellant raised the issue again in his motion to reconsider. *Motion to Reconsider*.

Respondent cites the case of *State v. Mitchell* in support of its argument, but *Mitchell* does not involve appellate review based on an incomplete record and really only addresses a failure to affirmatively make a request and the fact that such failures constitute waiver. "Based on this record, Appellant argues he is entitled to a new trial. Initially, this issue is procedurally barred because, while he indicated he might need a recess, counsel never actually requested one." *State v. Mitchell*, 330 S.C. 189, 193 (S.C. 1998). Unlike in *Mitchell*, Appellant actually did motion the court for a new trial based upon the fact the State began making arguments in direct contradiction to its stipulation during the hearing. *Trascript,* p. 5, ll 2-7 and p. 15, ll 20-25. The earliest moment Appellant could have known about this shift in the State's position was at the hearing, because the State did not file a brief at or prior to the hearing before Judge Dukes. Respondent agrues Appellant should have done more but does not explain what more Appellant could do other than

raise the issue to the Court at the hearing and again in his motion to reconsider. Because of these distinctions, *Mitchell* is not applicable.

Respondent also cites *State v. Freeman* but *Freeman* involved a far more complete record than this case and centered around (a) the validity or invalidity of a search warrant, (b) failure to disclose, (c) newly discovered evidence, (d) conduct of the trial judge, and (e) separate trials. In discussing that case, the appellate court citing *Maryland* stated "A valid search warrant properly executed, may produce evidence sufficient to convict a person accused of a crime. A defective and invalid search warrant produces confusion, waste and injustice, to an accused or to society, or to both." *State v. Freeman*, 319 S.C. 110, 117 (S.C. Ct. App. 1995). Additionally, *Freeman* actually involved the granting of a new trial on appellate review. "Having found the search warrant invalid and the conduct of the trial judge prejudicially affected the fairness of the trial, [the Appellate Court] reverse[d] and remand[ed] for a new trial." *State v. Freeman*, at 124. Because of these points, *Freeman* actually weighs in favor of Appellant.

Next, Respondent argues the Magistrate Return (assuming review is confined to the Respondent's stipulation, includes (1) a summary of the trial testimony, (2) description of Appellant's motion for directed verdict and the court's ruling on that motion, (3) description of the jury's verdict finding Appellant guilty of trespassing, (4) an audio recording of the trial (later deemed by the circuit court to be corrupted but not included in the Record on Appeal before this Court), and (5) Plaintiff's Exhibits 1-3 and Defendant's Exhibits 3 and 4. Initial Brief of Respondent at 10-11. This is incorrect. The Magistrate Return is simply the document itself. Not the additional record as argued by the State.

Respondent cites *Great Games* in support of its position, but this case specifically addresses whether procedural defects of an Appellant rob the court of subject matter jurisdiction.

In deciding this issue, the Court states "[t]he circuit court erroneously characterized the jurisdictional defect as one relating to the court's subject matter jurisdiction. Subject matter jurisdiction refers to the court's "power to hear and determine cases of the general class to which the proceedings in question belong". . . The failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of "appellate" jurisdiction over the case, but it does not affect the court's subject matter jurisdiction. (emphasis supplied) (internal citations omitted). *Great Games*, 529 S.E.2d at 83 n. 5. *State v. Brown*, 358 S.C. 382, 387 (S.C. 2004). Since the Appellate Court in *Brown* considers facts outside the Magistrate's Return, upon information and belief, *Brown* actually serves to support Appellant's position, not Resopndent's. "This Court has held that it is error for the Court of Appeals to consider facts not included in the magistrate's return. *State v.Osborne*, 335 S.C. 172, 176 n. 6, 516 S.E.2d 201, 203 n. 6 (1999) (holding that it was error for the Court of Appeals to rely on the recitation of facts contained in an appellate order instead of restricting itself to the facts contained in the magistrate's return). See also, *State v. Barbee*, 280 S.C. 328, 313 S.E.2d 297 (1984) (magistrate's return is the official record of trial proceedings); *State v. Sarvis*, 265 S.C. 144, 147, 217 S.E.2d 38, 39 (1975) ('While the arguments indicate some disagreement as to the facts, we are bound by the Return of the magistrate before whom the respondent was tried')." *State v. Brown*, 358 S.C. 382, 387-88 (S.C. 2004).

It is axiomatic that if Appellant is confined to the Magistrate Return, and that Return is incomplete because the recording of the trial is corrupted and incapable of being transcribed, Appellant is prevented from seeking meaningful Appellate review. While Respondent relies on *China v. Parrott* which stands for the proposition that: "Where there is a disagreement as to what the record on appeal should contain, the duty and responsibility of settling the question rests upon the trial judge. Section 7-406, 1962 Code of Laws; Rule 4, Section 7, Rules of the Supreme

Court; *South Carolina State Highway Department v. Meredith*, 241 S.C. 306, 128 S.E.2d 179; *Southern Pine Lumber Co. v. Martin*, 118 S.C. 319, 110 S.E. 804." *China v. Parrott* 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968), here there was no disagreement. There was a stipulation between parties as to what the record would be and then there was a deviation from this stipulation by Respondent and only Respondent. In response and as soon as the deviation became apparent, Appellant motioned the Court for a new trial which was taken under advisement and subsequently denied. *Transcript*, p. 4, ll 18-23. Once it was denied, Appeallant again motioned the court in a motion to reconsider. *Motion to Reconsider.* Likewise, Respondent relies on *State v. Ladson*, but in that case, the Court states "[b]ased on the State's assurance that the record could be easily reconstructed, a judge of this court denied Ladson's motion and remanded the matter to the trial court to reconstruct the record." *State v. Ladson*, 373 S.C. 320, 325, 644 S.E.2d 271, 273-74 (Ct. App. 2007). Per this case, Appellant's course was correct. He asked the appellate court to grant a new trial, just like the movant in *Ladson*. See also, *Koon v. State*, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) (recognizing a court's power to remand for a reconstruction hearing), overruled on other grounds by *State v. Gentry*, 363 S.C. 93, 105, 610 S.E.2d 494, 501 (2005); *Whitehead v. State*, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002) (finding that when a transcript has been lost or destroyed, an appellate court may remand to have the record reconstructed); *Dolive v. J.E.E. Developers, Inc.*, 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct.App. 1992) (holding trial court did not err in granting property owner's request to reconstruct the record of zoning proceeding where portions of original tape of hearing were incapable of being transcribed) (emphasis added). To hold Appellant to the standard that he must submit his request to the trial court when he is in an active appellate hearing with the circuit court makes no sense. Only the appellate court would have the authority to remand its case back to the magistrate court to do anything. In *Ladson*,

approximately 10 months transpired after the appeal was filed before the Court reporter notified the parties that her recording equipment failed. Id. at 326. In *Ladson*, the Appellate Court contends "the conclusory and summary nature of the purported record on appeal does not permit meaningful appellate review." Id. The Appellate Court finds that "*Ladson* has established prejudice and demonstrated that the reconstructed record before us does not allow for meaningful appellate review" and a new trial is warranted "...because we find the reconstructed record insufficient for meaningful review of direct appeal issues, we reverse and remand for a new trial." Id.

"[T]he fact of a missing portion of the trial transcript is usually brought to the court's attention much earlier than the year-plus delay present here. We are left with a few gratuitous references to generic motions and objections, but we do not know the context of the motions, the specific nature of the motions, and whether the challenged evidence was cumulative to other unchallenged evidence." Id.

In *Ladson* the passage of time clearly dimmed the recall of participants. The same is true in this case, especially if the record is expanded beyond the parties' stipulations. If this court ordered the matter remanded to the trial court, assuming a hearing by April 1, 2025, the witnesses would be testifying to facts that occurred almost two years ago.

Adams v. H.R. Allen, Inc., CAN, 397 S.C. 652, 656-57, 726 S.E.2d 9, 12 (Ct. App. 2021) specifically involves a partially incomplete record ("After Zurich requested review of the single commissioner's decision, it became evident that the reporter's equipment had malfunctioned and portions of the hearing were inaudible.") (emphasis added). In *Adams*, the court conducted a hybrid rehearing that expanded the scope beyond what occurred at the prior hearing ("We agree with Appellants' contention that "the preferable options would have been to have reconstructed only the incomplete portions of the original transcript or to have remanded for an entirely new

hearing." While we agree the trial court has discretion in determining how to reconstruct missing portions of a transcript, this discretion must lie within the limits required by procedural due process. Here, although the Commission ordered a rehearing, the single commissioner conducted the subsequent hearing in a hybrid manner that was neither a true rehearing of the matter on the merits nor a straight-forward reconstruction of the original transcript. Such a hybrid approach to rehearing constitutes a structural defect that cannot be reviewed under the harmless error standard. While we are mindful of the importance of judicial efficiency, we find the hybrid rehearing procedure in this case violated Appellants' right to procedural due process").

Respondent argues Appellant failed to established that the court was prevented from conducting meaningful appellate review. Id. at 10. Appellant incorporates by reference his previous arguments herein.

Respondent relies on *State v. Hall*, 253 S.C. 294, 295, 170 S.E.2d 379, 380 (1969). This case is not applicable to Apellant's issue before this Court. *Hall* involves a "defendant [failing to] raise the objections to the instructions at the trial, although full opportunity was afforded to do so in compliance with the provisions of Section 10-1210 of the 1962 Code of Laws (also appearing as Section 17-513.1). The failure of defendant to object or to request additional instructions, when opportunity was afforded, constituted a waiver of any right to complain on appeal of errors in the charge." These facts do not apply to this case.

Appellant's counsel takes issue with Respondent's statement that "[i]nstead, armed with the knowledge that a transcript of the trial had not been prepared and the audio recording had been deemed corrupted, Appellant attempted to 'game' his appeal by trying to limit the circuit court to consideration of only a select set of "stipulated" facts, regardless of whether a broader set of facts was actually considered by the jury in reaching its verdict." *Initial Brief of Respondent* at 13.

There was no gaming unless it was on the part of Respondent. Appellant emailed Respondent and specifically communicated "Please see attached my draft final brief [for Judge Dukes] for this appeal. Can you just review paragraph 8 and verify for me if those stipulations are agreeable to you? I tried to do this just on the Magistrate Return but without those stipulations I just don't think I can do the appeal on the record as it exists. There's just too much that is incomplete. I understand from my client that the proposed stipulations in paragraph 8 were established at trial, I just can't prove it since my stenographer could not complete the transcript because the recording was corrupted." *Email between counsel of record March 19, 2024*. Respondent knew Appellant's counsel was not counsel of record for the trial. Respondent found those stipulations acceptable and then made arguments in contravention to that stipulation during the hearing before Judge Dukes. Had Respondent simply replied to Appellant's email dated March 19, 2024 indicating the stipulations were not acceptable, the entire exercise would have resolved with Appellant simply motioning the circuit to remand the matter for a new trial to reconstruct the record. Instead, we and the court are left with the State making argument in contravention to its own stipulation. When Respondent states "the burden was on the Appellant to provide a sufficient record from which an appellate court can make an intelligent review, Appellant would remind Respondent he was never allowed to do that. He made that request to the court and his request was never even addressed. Compare *Transcript*, p. 4, ll 18-23 and p. 14, ll 7-10 to Order filed May 3, 2024.

Since argument outside of the stipulations is addressed throughout Respondent's Initial Brief, they are discussed herein only to avoid duplicative discussion of this point. Respondent argues that the record establishes Appellant could have had his Wife bring the golf cart to the office or that Appellant could have had the carts inspected at an alternative location. *Initial Brief of Respondent* at 21. Even if these arguments are allowed in contravention of the State's

stipulation, the Record is void of evidence that responds to these points, and the Circuit Court's decision to avoid addressing Appellant's request is violative of his due process right to be heard.

II. The Defense of Necessity is not controlling on this appeal

The Respondent discusses the defense of necessity but that is not controlling. The statute itself offers a less burdensome exception: (S.C. Code § 16-11-620 provides: Any person who, without legal cause or good excuse, enters into the dwelling house, place of business, or on the premises of another person after having been warned not to do so or any person who, having entered into the dwelling house, place of business, or on the premises of another person without having been warned fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative shall, on conviction, be fined not more than two hundred dollars or be imprisoned for not more than thirty days.)

In this case, the question is whether Appellant's entry into the HOA office after notice of trespass to pay fees he is required to pay constitutes "legal cause or good excuse" versus necessity as argued by Respondent is a question of law.

South Carolina does not explicitly define "legal cause" or "good excuse". However, law enforcement showing up to respond to a complaint is "legal cause." ". . . Police officers . . . responding to a complaint and therefore ha[ving] legal cause to be on the property" constitutes legal cause or good excuse. *Town of Springdale v. Butler*, 299 S.C. 276, 279 (S.C. 1989).

South Carolina also has a carve out for public protesting on public property. *State v. Hanapole*, 255 S.C. 258, 268 (S.C. 1970):

> It is the position of the appellants that their conviction for trespass, under Section 16-388 of the Code, was improper as this statute applies only to private property and has no application to public property. We agree with this contention. In the case of *City of Greenville v.*

Peterson, 239 S.C. 298, 122 S.E.2d 826, this court stated that Section 16-388 was "clearly for the purpose of protecting the rights of the owners or those in control of private property" and the owner of such property "may lawfully forbid any and all persons, * * * to enter or remain upon any part of his premises which are not devoted to public use." It follows that since Section 16-388 applies only to private property, a conviction thereunder for an alleged trespass upon public property is not warranted and cannot be sustained.

(In *Hanapole*, the Court cited a segregation era case that has long since been overturned, but which had the highlighted dicta above).

No other cases in South Carolina deal with this issue (that Appellant has found).

Interrestingly, a few other states' trespass statutes are identical or nearly identical to South Carolina's. Alabama used to have a statute virtually identical to ours:

Peeples v. City of Montgomery, 506 So. 2d 366, 367 (Ala. Crim. App. 1987) ("Former § 13-2-100, trespass after warning, involved "(a)ny person who, without legal cause or good excuse, enters . . . on the premises of another, after having been warned within six months preceding not to do so." (Emphasis added.) Wright held that one was not guilty of trespass under this statute where the reentry after warning was for the "bona fide purpose of securing his clothing" and "closing up his business." These were "good excuses" and the statute was "not directed against a trespass made under good excuse." *Wright*, 20 Ala. App. at 90-91, 101 So. 815.").

In *Central Iron Coal Co. v. Wright*, 20 Ala. App. 82, 90 (Ala. Crim. App. 1924), the court found that an individual who had been warned to leave the company's property was not guilty of trespass when he returned to retrieve his belongings and settle his affairs. (emphasis added). The court reasoned that entering the property for these purposes constituted a "good excuse" and that the trespass statute was "not directed against a trespass made under good excuse." However, this case involved a former statute relating to "trespass after warning", which has been replaced by Alabama's current criminal code trespass statute (§ 16-11-620).

That an entry upon the premises after warning is made for a legal cause or under a good excuse will justify the entry is apparent from the provisions of the statute. It can be said as a matter of law and of fact that under the evidence in this case Appellant entered upon the premises after being warned not to do so and that such entry was for a legal cause or under a good excuse. The

evidence of the appellee in *Wright* tends to establish the following facts: That he was warned to leave Holt, or the premises of appellant, on the night of April 30, 1922; that he then stated that it would be impossible for him to leave until the next morning; that he was then warned to leave the following morning; that he did leave the next morning about 7:30 o'clock for Tuscaloosa; that while on the way to the car station defendant's agent, Willis Jones, told plaintiff, "I thought I told you to leave Holt," and that plaintiff replied, "I am going right now, Mr. Jones"; that when plaintiff left Holt that morning he then had property, viz., his clothing, on the premises of defendant; that he returned from Tuscaloosa to Holt about 3:30 or 4 o'clock on the afternoon of that day for the bona fide purpose of getting his clothes and winding up his affairs; that when he reached Holt he went directly looking for Mr. Jones to get permission to get his clothes and wind up his business, and that Jones gave this permission (Jones denied giving the permission, but stated that plaintiff requested the permission); that while returning to the car station after securing his clothes and winding up his business, he went into the commissary of defendant, a place open to the public, to get a $5 bill changed; and that as he was leaving he was arrested.

To the extent the decision in this case rests on the defense of necessity, it ignores the Appellant's contention that the facts equated to legal cause and good excuse without regard to necessity.

CONCLUSION

Based upon the forgoing, Appellant respectfully reaffirms his request that the South Carolina Magistrate's Order denying him a new trial based on the lack of the trial court record be remanded for a new trial and that his previous conviction be vacated.

Respectfully Submitted,

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