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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County
Honorable J. Michael Baxley, Circuit Court Judge
Appellate Case No. 2013-001415

THE STATE,

Respondent,

vs.

FRITZ A. TIMMONS,

Appellant.

**MOTION TO STRIKE
AND REQUIRE FILING OF
AMENDED INITIAL BRIEF OF APPELLANT OR TO HAVE THE COURT
DISREGARD**

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

Procedural History

On March 18, 2013, the Honorable John A. Davis, of the Magistrate Court of Chesterfield County, held a bench trial in the case of Chesterfield County v. Fritz Timmons. Appellant Fritz Timmons attended to defend against the charges against him. Prior to the bench trial, Appellant raised two motions to dismiss. The magistrate judge denied each of the motions.

Following the bench trial, Judge Davis found Appellant guilty of Uniform Ordinance Summons 1900, 1901, and 1902 for violating S.C. Code 47-1-40, which is commonly referred to as Ill-Treatment of Animals, and Uniform Ordinance Summons 1887, 1888, 1898, 1899, 1900,

1903, 1904, and 1905 for violating 47-1-70, which is commonly referred to as Animal Abandonment or Neglect. The magistrate judge imposed a sentence of Three Thousand Dollars (\$3,000.00) in fines with scheduled payments.

Thereafter, Appellant appealed the magistrate judge's ruling to the circuit court.

On May 8, 2013, the Honorable J. Michael Baxley held a hearing in circuit court regarding Appellant's appeal from the magistrate court. Judge Baxley ruled the appeal inartfully pled because Appellant filled out a civil appeal form, as opposed to a criminal appeal form, and Appellant did not appropriately state his exceptions to the magistrate court's judgment. Also, the court construed Appellant's arguments at the hearing to raise an issue of probable cause. However, the court determined there was sufficient probable cause based on the facts and the law presented.

Motion to Strike Factual Assertions, Statements, Arguments from Initial Brief of Appellant

It is Appellant's obligation to present an appropriate record on appeal, including moving the magistrate to correct the Return, if necessary. Price v. Pickens County, 308 S.C. 64, 416 S.E.2d 666 (Ct. App. 1992); State v. Barbee, 280 S.C. 328, 313 S.E.2d 297 (1984); State v. Adams, 244 S.C. 323, 137 S.E.2d 100 (1964). Any issue presented to this Court for consideration on appeal must have been raised to and ruled upon below. Price v. Pickens County, 308 S.C. at 64, 416 S.E.2d at 666. Specifically, the circuit court may not consider a question not presented to the magistrate, Indigo Associates v. Ryan Investment Co., 314 S.C. 519, 431 S.E.2d 271 (Ct.App. 1994), and this Court may not consider an issue not raised to the circuit court. A & I, Inc. v. Gore, 366 S.C. 233, 621 S.E.2d 383 (Ct.App. 2005). Upon appeal of the magistrate court's conviction, the magistrate shall file the notice of appeal in the circuit court along with the magistrate's return which includes the record and statement of proceedings and

testimony presented. City of Greenville v. Latimer, 80 S.C. 92, 61 S.E. 224 (1908). The circuit court is limited to consideration of these documents for the appeal. Id.

Once a case has been appealed from the trial court, the Record on Appeal can only contain matter presented to the trial judge. See Rule 210(c), SCACR (“The Record shall not, however, include matter which was not presented to the lower court or tribunal.”). Significantly, “the appellate court will not consider any fact which does not appear in the Record on Appeal.” Rule 210(h), SCACR. Rule 210(c), SCACR, provides that the Record on Appeal “shall include all matter designated to be included by any party under Rule 209. . .” Critically, the rule further provides that the Record on Appeal “shall not, however, include matter **which was not presented to the lower court or tribunal.**” Id. (emphasis added).

In the case sub judice, Appellant references a letter allegedly sent to him by the Darlington Clerk of Court in case number 2009-CP-16-540, which includes a reference to the Honorable Paul M. Burch and an anonymous e-mail Appellant asserts the officers used as probable cause to obtain a warrant. (App. Br. pp. 2, 7). These factual assertions appear to arise from a completely different civil case and not the criminal matter involved in this pending appeal. The docket number for the circuit court appeal in this case is 2013-CP-13-00150. Also, Appellant presents factual assertions concerning the valid search and seizure of abused animals conducted by law enforcement and animal control. Specifically, Appellant asserts that law enforcement did not leave any “papers” at the residency, law enforcement interviewed his neighbor, and law enforcement damaged his property. (App. Br. pp. 2, 13). Appellant also mentions an interrogation by Chesterfield sheriff deputies and threats by an animal shelter director, Jim McGonigal, including specific statements allegedly made by McGonigal to Appellant. (App. Br. pp. 3-4, 9, 12, 17, 19, 22, 24, 25). In addition, Appellant asserts factual

statements from media outlets allegedly relating to the instant case, including a local news outlet, various animal shelters' FaceBook pages, and a local newspaper. (App. Br. pp. 4-5, 14, 17, 23, 27-28). Appellant includes statements James Lewis allegedly made regarding the basis for probable cause, which are not in the trial court record. (App. Br. p. 25). These assertions and factual statements are outside the record in this case and cannot properly be included in the Record on Appeal or in Appellant's brief. References to proceedings Appellant contends occurred on March 5, 2013 also fall outside this Record and may not be properly included in the Record on Appeal or Appellant's brief. Appellant's trial occurred on March 18, 2013. The magistrate's return indicates Appellant did not testify at trial but made two motions to dismiss and offered photographs and receipts for the magistrate's consideration. These assertions and/or statements should either not be considered by this Court during the appeal or this Court should strike the matters and require Appellant to file an amended brief complying with the appellate court rules.

Appellant asserts Judge Baxley was prejudiced because he stated "with all this evidence against you, you're lucky you're not in jail," a statement he asserts was purposely omitted by the court reporter and made by the judge with "papers in hand and arm outstretched." (App. Br. p. 7). On the contrary, a similar statement is included in the circuit court hearing transcript, and Appellant's clear misconstruction of the judge's comments should be stricken from his brief. (R. p. 9). Appellant also asserts his yard is "totally enclosed by woods with no possibility of plain view," and that his residence was "broken into during working hours," allegations not presented to the trial court or included in the record for consideration by the circuit court. (R. p. 10, 15-16). Appellant mentions that animal control purposely omitted pictures of food and water from

the magistrate court return. (App. Br. p. 20). However, this assertion should be stricken from the brief because the trial court record did include pictures of food and water bowls.

The foregoing factual assertions made in Appellant's initial brief are not contained in the trial court record and have not been presented to the trial judge and cannot be included for consideration by this Court. The magistrate's entire return and the transcript of the circuit court appeal are produced in the Supplemental Record on Appeal. The Supplemental Record on Appeal contains the only material appropriate for this Court's consideration. Therefore, those assertions cannot appropriately be embodied in Appellant's brief pursuant to our appellate court rules. See Williamsburg Rural Water & Sewer Co., Inc. v. Williamsburg County Water & Sewer Auth., 367 S.C. 566, 571, 627 S.E.2d 690, 693 (2006) ("Nothing in the appellate court rules permits a party to unilaterally add after-created evidence to the record."); South Carolina State Highway Dep't v. Meredith, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) ("[C]ounsel is prohibited from embodying in their briefs any fact which does not appear in the record."); see also Rule 210(h), SCACR ("[T]he appellate court **will not consider any fact** which does not appear in the Record on Appeal." (emphasis added)). Accordingly, the State asks this Court to either strike the arguments, statements, of factual assertions from Appellant's brief or decline to consider the factual assertions, arguments and statements included in Appellant's brief that do not appear in the record of the trial court and circuit court proceedings. The magistrate's return lists all documents, photographs, and testimony considered at trial. The circuit court's consideration was necessarily limited to the magistrate's return and information before the magistrate at the time of trial and for the purposes of the trial in **this** case.

Motion to Require Amended Initial Brief of Respondent Containing Citing References

The South Carolina Appellate Court Rules govern the form and content of appellate briefs. See Rule 208, SCACR (establishing the required format for initial briefs); Rule 211, SCACR (establishing the required format for final briefs). Pursuant to Rule 208(b) (4), SCACR, appellate briefs must contain references to transcripts or other matter supporting the facts alleged. “In the initial briefs, these references should be to the page and line number of the transcript prepared by the court reporter or by the page of the material to be referenced[.]” Rule 208(b) (4), SCACR.

In his brief, Appellant repeatedly cities to facts, testimony, and other documents allegedly presented during the trial court proceedings in his summary of the facts and in support of his appellate arguments. However, aside from a few occasions in the thirty-three page brief, Appellant did not include any identifying references to the transcripts or other materials supporting those factual allegations. (“[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review.”). Accordingly, the State asks this Court to either decline to consider the matters included in Appellant’s brief that are outside the Record on Appeal or Supplemental Record on Appeal and that are not supported by specific citations to the Record or require Appellant to file and serve an amended brief omitting the facts and statements that are not found in the Record before this Court and containing identifiable references to the transcripts or materials being referred to in support of Appellant’s factual allegations in a manner consistent with the requirements of our appellate court rules.

Motion to Strike Improperly Designated Matter and References to the Matter in the Initial Brief of Appellant

Rule 210(c), SCACR, provides that the Record on Appeal “shall include all matter designated to be included by any party under Rule 209. . .” Critically, the rule further provides that the Record on Appeal “shall not, however, include matter **which was not presented to the lower court or tribunal.**” Id. (emphasis added).

In the case at bar, Appellant has designated for inclusion in the Record on Appeal an Order described as “Order of March 18, 2013.” However, Appellant’s Record on Appeal contains an order dated March 5, 2013, which appears to be related to some criminal proceeding occurring on March 5, 2013, and which designates animals at Appellant’s property in temporary custody of Chesterfield County. This order appears unrelated to Appellant’s March 18, 2013, trial and was not referenced or included in the Magistrate’s Return. Appellant also includes photographs not appearing in the Magistrate’s Return as having been presented at trial. Notably, Appellant appears to include magnified photographs of each picture he designated for the record. The magnified photographs which were not presented in this fashion at trial appear as the photographs on the bottom half of pages 43, 44, 45, 46, and 47 of Appellant’s Record on Appeal. Only the regular-sized photographs appeared in the trial court record, not Appellant’s magnified versions. (R. pp. 43-48; see Supp. R. pp. 1-2; 8; 10; 41-44).

Because the order and magnified photographs were either not presented to the trial judge and/or were not included in the Return prepared by the magistrate and transmitted to the circuit court in this case, the documents cannot properly be included in the Record on Appeal. See State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) (“Morris’ statement was not presented to the lower court and cannot properly be included in the Record on Appeal.”).

Therefore, the State asks this Court to either decline to consider the documents or to strike that

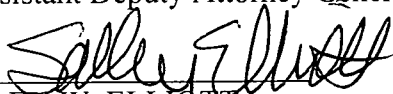
matter from Appellant's Designation of Matter, Brief of Appellant, and Record on Appeal and to require Appellant to file an amended brief and Record on Appeal containing no references to the improperly-designated matter.

WHEREFORE, Respondent prays that this Court will strike the portions of the Appellant's containing factual assertions not appearing in the record of the trial court proceedings or before the circuit court; strike the portion of the Appellant's brief containing references to improperly-designated material not presented below; strike all improperly-designated material from Appellant's Designation of Matter; require the filing of an amended brief by Appellant containing no reference to the unsupported factual assertions, or improperly-designated material; require the filing of an amended brief by Appellant complying with the requirements of Rule 208, SCACR or, short of requiring an amended brief, to decline to consider the improperly included documents, arguments, and statements; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

May 20, 2014

STATE OF SOUTH CAROLINA
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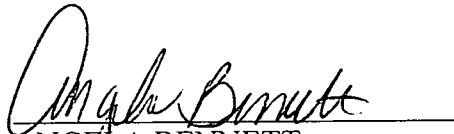
Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Motion to Strike and Require Filing of Amended Initial Brief of Appellant or to Have the Court Disregard by depositing two copies of the same in the United States mail, postage prepaid, addressed to Fritz A. Timmons, Post Office Box 367, Hartsville, SC 29551.

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

This 20th day of May, 2014.


ANGELA BENNETT
Administrative Assistant
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ALAN WILSON
ATTORNEY GENERAL

May 20, 2014

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State v. Fritz Timmons

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of Motion to Strike and Require Filing of Amended Initial Brief of Appellant in the above-referenced case.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General

SWE/ab
Enclosures

cc: Fritz A. Timmons

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