

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge
Appellate Case No. 2013-002227

RECEIVED
JUL 23 2014
SC Court of Appeals

THE STATE,

Respondent,

vs.

LYNNE SMITH SAUCIER,

Appellant.

**MOTION TO STRIKE UNSUPPORTED FACTUAL ASSERTIONS IN APPELLANT'S
INITIAL BRIEF OR TO REQUIRE AMENDED INITIAL BRIEF WITH SPECIFIC
CITATIONS AND TO HOLD RESPONDENT'S DEADLINES IN ABEYANCE**

The State, moving to strike portions of the Initial Brief of Appellant or require an amended initial brief with specific citations and to hold Respondent's deadlines in abeyance, would respectfully show the Court:

I.

In 2013, Petitioner was found guilty of pointing and presenting a firearm. She was sentenced to imprisonment for a determinate term of five years provided the sentence is suspended with probation for five years. Petitioner filed a timely motion for appeal.

II.

On May 12, 2014, Appellant submitted the Initial Brief of Appellant. Included in Appellant Initial Brief is a section entitled "Facts". The final sentence of the first paragraph of the "Facts" section contains substantive facts not present in the transcript or record of this case

by way of an on-the-record motion or objection, on-the-record commemoration of any in-chambers discussions or by proffer. Appellant does not provide a citation or reference to the transcript or other matter presented on the record in support of the factual statement. The entire second paragraph in the “Facts” section also contains substantive facts that are not present in the transcript or record. Also, the first full paragraph on page four (4) of the “Argument” portion of Appellant’s brief includes facts not appearing in the transcript or record of this case by way of on-the-record motion or objection, on-the-record commemoration of any in-chambers discussions or by proffer. Appellant designates the full trial transcript as his proposed Record on Appeal but does not provide a citation or reference to the transcript or other matter in support of the factual statement. Nothing appears in the transcript to support Appellant’s factual assertions as outlined above.

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. The specific factual assertions in Appellant’s Initial Brief as outlined above are not contained in the trial court transcript and no other matter is designated. Appellant never presented the information on pages 2 and 4 as outlined herein by Respondent on the record before the lower court. There facts may not appropriately be embodied in Appellant’s initial 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 aftercreated 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 brief any fact which does not appear in the record.”); Morris v. Tidewater Land & Timber, Inc., 388 S.C. 317, 333, n. 16, 696 S.E.2d 599, 608 (Ct. App. 2010) (“Under our appellate court rules, we may not consider any fact that 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)). Moreover, any objection or motion made during an off-the-record conference which is not made part of the record does not preserve the question for review. State v. Hamilton, 344 S.C. 344, 361, 543 S.E. 2d 586. 595 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). It certainly may not be included in an Initial Brief of Appellant because it falls outside of the record before the court. Our error preservation rules require an objection or motion to be made on specific grounds by Appellant and a subsequent ruling by the trial court. A motion or objection without a specific ground or without a ruling fails to preserve an issue for appellate review. Busillo v. City of North Charleston, 404 S.C. 604, 745 S.E.2d 142 (Ct. App. 2013); State v. Jennings, 394 S.C. 473, 481-482, 716 S.E.2d 91, 95 (2011); State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004); State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995) overruled on other grounds by State v. Collins, 320 S.C. 23, 495 S.E.2d 202 (1998); State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1991). A ruling without motion or objection supported by specific grounds fails to preserve an issue for appellate review. Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 64 S.E.2d 253 (1951); see also State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct. App. 2005), rev. on other grounds by State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). The record designated by Appellant is devoid of motion or objection by Appellant. The fact that the trial court made a reference to a prior civil action and judgment when it ruled it inadmissible as evidence for trial

preserves nothing to Appellant who failed to establish a request for admission and objection to the ruling on the same grounds she now presents on appeal.

Nevertheless, Appellant cannot include facts in her brief that are not supported by the trial record. In her brief, Appellant references a prior civil suit between Appellant and her neighbors and outlines the basis for a prior civil action. (App. Br. p. 2, 4). While the trial court ruled that the prior civil suit would not be admitted as evidence, the underlying facts presented in Appellant's brief are not present on the record by way of motion, objection, argument or proffer. Appellant's brief contains the factual assertion that "Appellant and her neighbors have had a long and tumultuous relationship involving unfounded criminal charges initiated by Carol and Robert Jones and a successful malicious prosecution, abuse of process, and defamation suit against the Jones." (App. Br. p. 2). Appellant's brief states that the Jones "falsely accused" Appellant of firing at them and charged her with Assault and Battery of a High and Aggravated Nature. (App. Br. p. 2). Appellant's brief further expounds by saying that Appellant was arrested and the charge was ultimately dismissed. (App. Br. p. 2). Appellant's brief then discloses that Appellant subsequently initiated a civil suit against the Jones' for malicious prosecution and abuse of process that resulted in a \$35,000 verdict in favor of Appellant on March 22, 2012. 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. Additionally, on page 4 of her brief, Appellant argues that she sought the ability to present evidence respecting the civil action and her "longstanding tumultuous" relationship with the Jones. Our appellate court rules require that briefs must contain references to transcripts or other record-related matter supporting 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. However, nothing in the transcript included in Appellant's Designation of Matter supports or allows for these factual statements. Because Appellant fails to provide any identifying references to the transcripts or other material supporting the factual assertions on pages 2 and 4 of Appellant's Initial Brief as identified by Respondent herein, Appellant should be required to either remove these factual assertions from her brief and submit an amended initial brief with redactions or submit an amended initial brief with specific and proper citations to the transcript or other material that support the factual statements.

III.

Respondent also moves this Court to hold the time for filing and serving the Initial Brief of Respondent and Designation of Matter in abeyance pending this Court's ruling whether facts and argument must be stricken from Appellant's initial brief or whether Appellant must submit an amended initial brief with specific citations supporting the factual assertions in order to allow for a proper response by Respondent.

IV.

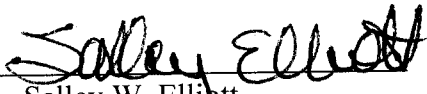
WHEREFORE, the State respectfully asks this Court to either require Appellant to strike the final sentence of the first paragraph of the section entitled "Facts", the entire second paragraph of the "Facts" section, and the portions of page 4 identified herein from Appellant's Initial Brief and the filing of a redacted amended brief to so reflect or to require Appellant to file an amended initial brief of Appellant providing specific references to the transcript or other material supporting the factual assertions. Respondent also respectfully asks this Court to hold its deadlines in abeyance pending a ruling on this motion to allow Respondent to submit a proper responsive brief.

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

BY: 
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ATTORNEYS FOR RESPONDENT

July 25, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
The Honorable Lee S. Alford, Presiding Judge

Appellate Case No: 2013-002227

THE STATE,

Respondent,

vs.

LYNNE SMITH SAUCIER,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the **Motion to Strike Unsupported Factual Assertions in Appellant's Initial Brief or to Require Amended Initial Brief with Specific Citations and to Hold Respondent's Deadline in Abeyance** on appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to her attorney, R. Mills Ariail, Jr., Esquire, 11 N. Irvine Street, Suite 11, Greenville, SC 29601.

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

This 25th day of July, 2014.


ANGELA BENNETT
Administrative Assistant

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ALAN WILSON
ATTORNEY GENERAL

July 25, 2014

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

Re: The State v. Lynne Smith Saucier
Appellate Case N: 2013-002227

Dear Mr. Kitchings:

Enclosed please find the original and six copies of the **Motion to Strike Unsupported Factual Assertions in Appellant's Initial Brief or to Require Amended Initial Brief with Specific Citations and to Hold Respondent's Deadline in Abeyance** along with proof of service in the above-referenced case.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

SWE/ab
Enclosures

cc: R. Mills Ariail, Jr., Esquire
Ms. Trisha Allen

RECEIVED
JUL 25 2014
SC Court of Appeals