

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

RECEIVED

JUL 22 2014

SC Court of Appeals

THE STATE,

Respondent,

vs.

FRITZ A. TIMMONS,

Appellant.

**MOTION TO STRIKE OR DISREGARD UNSUPPORTED STATEMENTS IN
APPELLANT'S INITIAL REPLY BRIEF**

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 presents a litany of factual assertions that are outside the Record on Appeal. Appellant asserts that Animal Control Officer Danielle Bowe’s testimony that “Canine Hanna” testified positive for hookworms and has tumors was incorrect, and that “Hanna” instead “has tumors and ulcers”. (App. Br. pp. 3, 10). Appellant states that he fed and watered his dogs and proceeded to work around 9:15 A.M. on the morning of March 4, 2013. (App. Br. p. 7). Appellant also asserts that Chesterfield County Animal Control (CCAC) travelled 35 miles to conduct a search and seizure, without a warrant, without probable cause, and without checking the dogs for positive ID for the express purpose of “gaining purebred dogs for quick profit by donation.” (App. Br. p. 7). Appellant asserts that CCAC failed to search the woods surrounding the property where the graves of deceased dogs were located. (App. Br. pp.7-8). Appellant also asserts that CCAC failed to confiscate all the wildlife in the surrounding woods. (App. Br. p. 8). Appellant also makes assertions regarding the interrogation of a former resident of Appellant’s property, and alleges that threats were made by CCAC to that former

resident. (App. Br. p. 8). Appellant mentions purchasing “100 lbs of Adult dog food and 12 cans of food (for the recovering ill(d)sic) dogs) before proceeding to a local restaurant to eat.” (App. Br. p. 8). Appellant also presents factual assertions concerning a series of conversations with Chesterfield County Deputies. (App. Br. p. 8). Specifically, Appellant mentions a conversation with a Chesterfield County Deputy at a restaurant and a subsequent phone conversation with Deputy Jay Lewis. (App. Br. p. 8). Appellant then states that law enforcement did not leave any “seized items list” at the residence and that law enforcement damaged his property. (App. Br. p. 8). Appellant also mentions an interrogation by Animal Control Officers and Sheriff’s Deputies and threats by an animal shelter director, Jim McGonigal, including specific statements allegedly made by McGonigal to Appellant. (App. Br. pp. 9-10). Appellant also asserts that the dead animals found in the yard at the time of the search were strays and animals that were previously buried that had been dug up by wildlife and dragged into the yard. (App. Br. p. 10). Appellant states that he traveled to the Chesterfield County Animal County Animal Shelter where he verified that the digs taken matched his own. (App. Br. p. 11). Appellant further states that at the Animal Shelter he was shown a carcass of a dog that Appellant did not recognize and believed it must be a stray. (App. Br. p. 11). Appellant also states that when he returned home from the animal shelter, he discovered an uncovered grave of carcasses. (App. Br. p. 11). Appellant also asserts that on March 6, 2013, Jim McGonigal met Appellant at the McBee police station and served a portion of the summons tickets, due to McGonigal being too busy to write out the rest of the summons tickets. (App. Br. pp. 11-12). Appellant mentions that Danielle Bowe sent a list of dogs seized to Jay Lewis for the warrant return on March 4, 2013 that did not list a bag of food nor a pet carrier that housed a mother dog and puppies. (App. Br. p. 12).

Appellant also makes factual assertions regarding 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. 12-14, 18). Appellant also asserts that Judge Davis added photos of canine carcasses to his return that were not presented at the hearing. (App. Br. p. 15). Appellant also makes the assertion that the anonymous email received by law enforcement leading to a search of his property was based on a possible "torte" by Judge Paul M. Burch due to Judge Burch being contacted regarding a case he allegedly failed to render a decision in from May 25, 2011. (App. Br. p. 14). Appellant also quotes Chesterfield Ordinance 11-12-14 Section 10(B), seemingly asserting that law enforcement officers were not justified in taking his dogs before the disposition of his legal case. (App. Br. pp. 10-11).

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, or 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.


Appellant's brief also argues that the charges against him were civil. (App. Br. p. 17). Appellant also argues that his use of a civil appeal form was permissible. (App. Br. p. 17). The State submits that this argument is not available for appellate review. An argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief. Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993). Appellant failed to make this argument in his original brief, electing to wait until his reply brief to advance this theory. Appellant's argument should, therefore, be stricken from the reply brief and not considered by this Court.

WHEREFORE, Respondent prays that this Court will strike or disregard the portions of the Appellant's reply brief containing factual assertions not appearing in the record of the trial court proceedings or before the circuit court; strike or disregard the portion of the Appellant's reply brief containing an argument not present in Appellant's initial brief; 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

July 22, 2014

STATE OF SOUTH CAROLINA
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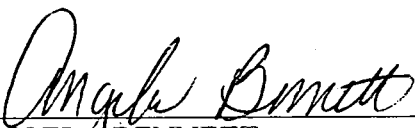
Appellant.

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 22nd day of July, 2014.


ANGELA BENNETT
Administrative Assistant
Office of Attorney General
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ALAN WILSON
ATTORNEY GENERAL

July 22, 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
Appellate Case No: 2013-001415

Dear Ms. Kitchings:

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

Sincerely,

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

SWE/ab
Enclosures

cc: Fritz A. Timmons

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