

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to the Court of Appeals
Appeal from Beaufort County
Honorable J. Ernest Kinard, Circuit Court Judge
Appellate Case No. 2012-212201

S.C. Supreme Court

THE STATE,

Petitioner,

vs.

DIAMON D. FRIPP,

Respondent.

MOTION TO STRIKE ARGUMENT FROM BRIEF OF RESPONDENT

The State, moving to strike the second argument presented in Diamon D. Fripp's Brief of Respondent, would respectfully show the Court:

I.

In 2013, Respondent Diamon Fripp was found guilty of trafficking cocaine. He was sentenced to imprisonment for twelve years and a fine of fifty thousand dollars. He filed a timely appeal.

II.

The Initial Brief and Final Brief were filed and served on behalf of Diamon Fripp by Appellate Defender Robert M. Pachak on August 23, 2010 and February 10, 2011, respectively. The State filed and served its Initial Brief in December 2010 and Final Brief on January 26, 2011. Jared S. Newman, Esquire was substituted as counsel for Diamon Fripp by order of the

Court of Appeals dated August 30, 2011. Oral argument was presented by the parties to the Court of Appeals on February 15, 2012. The Court of Appeals issued an opinion on March 21, 2012, in which it reversed the conviction based upon what it determined was an improper jury charge on constructive possession. In view of reversal on that issue, the Court of Appeals did not address two other issues presented by Fripp on appeal, including his contention the trial court erred in declining to suppress statements. State v. Fripp, 397 S.C. 455, 715 S.E.2d 136 (Ct. App. 2012).

III.

The State filed and served a Petition for Rehearing on March 22, 2012. **Damion Fripp did not submit a Petition for Rehearing.** The Court of Appeals denied the petition by order filed May 3, 2012.

The State filed and served a Petition for Writ of Certiorari on June 4, 2012, requesting this Court to grant certiorari review and reverse the opinion of the Court of Appeals respecting the jury charge on constructive possession. On June 12, 2012, Damion Fripp filed and served a motion to dismiss the petition and made return to the petition, arguing the State's petition did not present a question falling within Rule 242, SCACR, and contending the State was rehashing its previous argument respecting the constructive possession jury charge and that the issue was properly decided by the Court of Appeals. **Diamon Fripp did not submit a Petition for Writ of Certiorari.**

This Court granted the State's Petition for Writ of Certiorari by order dated July 10, 2014. On August 15, 2014, the State submitted its Brief of Petitioner presenting argument respecting the matter upon which it sought rehearing and certiorari review. Diamon Fripp filed and served his Brief of Respondent on August 30, 2014 in which he presented argument on the

constructive possession jury charge. However, Fripp also presented a second argument concerning the trial court's refusal to suppress statements which had not been ruled on by the Court of Appeals or made the subject of rehearing or request for certiorari review.

IV.

In order for an issue to be considered by this Court on review of a decision of the Court of Appeals by writ of certiorari, the issue must have been raised in a petition for rehearing before the Court of Appeals. Rule 242(d)(2), SCACR; State v. Johnson, 334 S.C. 78 n. 1, 512 S.E.2d 795 (1999) (stating this Court will decline to consider an issue the Court of Appeals did not address and that was not raised in petition for rehearing); Bonaparte v. Bonaparte, 317 S.C. 256, 452 S.E.2d 836 (1995), overruled on other grounds (same). The petition for writ of certiorari may be granted or denied **on any question presented**. Rule 242 (i), SCACR. If granted, this Court will issue an order specifying the issue or issues upon which certiorari review is granted and the parties shall thereafter submit briefs addressing the issue or issues as directed by this Court. Rule 242 (i), SCACR.

V.

The State moves to strike the second argument presented in the Brief of Respondent respecting the trial court's ruling on a motion to suppress. Although the issue was presented in briefs to the Court of Appeals, that Court did not rule on the issue, Fripp did not ask the Court of Appeals to rule on the issue, and it was not revisited by Fripp in a Petition for Rehearing or a Cross-Petition for Writ of Certiorari. The issue is not a subsidiary question comprised within the issue of the jury charge ruled upon by the Court of Appeal and upon which rehearing and certiorari review was sought by the State. See Rule 242 (d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition

for writ of certiorari as a question presented to the Supreme Court. A question presented will be deemed to include every subsidiary question fairly comprised therein.”). This Court’s order granting certiorari did not specify Fripp’s second argument respecting a motion to suppress as an issue to be addressed by the parties. Therefore, the argument is not proper for inclusion in the Brief of Respondent because it was not properly preserved for consideration by this Court, is not an issue upon which this Court ordered certiorari review, and is not a subsidiary to the issue this Court directed the parties to address. To the extent Fripp might argue the appellate court may affirm on any ground appearing in the record, the State submits that the rule allows the appellate court to affirm the **trial court** on any ground appearing in the record, not reverse the trial court’s ruling. Law v. S.C. Dept. of Corrections, 368 S.C. 424, 629 E.E.2d 642 (2006); Rule 220(c), SCACR. The argument must, therefore, be stricken from the Brief of Respondent.

V.

Respondent also submits that a Reply Brief of Petitioner would be filed only to address the second argument respecting the issue of suppression of a statement which is not properly before this Court. Respondent moves this Court to hold the time for filing and serving a Reply Brief of Petitioner in abeyance pending this Court’s ruling whether that argument must be stricken from Diamon Fripp’s brief. If the argument is stricken, the State will not submit a reply brief. If the argument is not stricken, it will be necessary for the State to address the issue in reply.

IV.

WHEREFORE, the State respectfully asks this Court to strike the second argument presented in Diamon Fripp’s Brief of Respondent respecting a motion to suppress as being improperly included in the brief. Respondent also respectfully asks this Court to hold its deadline


for filing and serving its Reply Brief in abeyance pending a ruling on this motion to allow Respondent to submit a proper responsive brief.

Respectfully submitted,

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September 9, 2014

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Motion to Strike Argument from Brief of Respondent on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, Jared S. Newman, Esquire, P.O. Box 515, Port Royal, South Carolina 29935.

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

This 9th day of September, 2014.


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