

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

JAN 28 2015

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2014-000632

SC Court of Appeals

THE STATE,

Respondent,

vs.

KYLIE NILSON,

Appellant.

**MOTION TO STRIKE APPELLANT'S
DESIGNATION OF MATTER FOR
FAILURE TO COMPLY WITH
RULE 210(c), SCACR**

Respondent now moves for this Court to strike Appellant's designation of matter. Specifically, Appellant, based on Appellant's reply brief, intends to include either a transcript or recording of the magistrate's proceedings that was not provided to the circuit court judge during the appeal in circuit court.¹ Since neither a transcript nor recording of the proceeding was presented to the circuit court, it is not proper for inclusion on the record on appeal in the present case. Rule 210(c) ("The Record shall not, however, include matter which was not presented to the lower court or tribunal").

¹ This case presents an appeal from circuit court where the circuit court affirmed appellate issues raised to the court from a conviction in magistrate court for unlawful alcohol concentration. Respondent argued several times in its initial brief that Appellant failed to make a sufficient record for review because no part of the magistrate court proceedings were presented to the circuit court.

I.

A review of the magistrate's return and the transcript of oral argument in circuit court reveals that neither the tape of the magistrate's proceeding, or a transcript of such a proceeding, was presented to Judge Culbertson. Indeed, a review of Appellant's initial brief suggests that such a transcript was not in her possession when her brief was composed, as it is devoid of citation to any transcript or recording. See Initial Brief of Appellant, Statement of Facts, found on pp. 1-2; Rule 208(b)(4), SCACR (concerning the contents of an initial brief and stating: "the brief shall contain references to the transcript. . . . In the initial briefs, these references should be to the page and line number of the transcript prepared by the court reporter . . ."); State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007) (excluding post-trial "Morris" letter not presented to the circuit court, and citing Rule 208(b)(4) and Rule 210(c), noting "a brief must reference the Record on Appeal to support the facts alleged.").

II.

Appellant, in her designation of matter, included "transcript of proceedings," which would appear to have been a reference to the transcript of the circuit court proceedings, since the magistrate court proceedings did not appear to be transcribed or made part of the record in circuit court. See Rule 209(a) (requiring the Designation of Matter to "set forth with specificity, those parts of the transcript, pleadings, orders, exhibits, or other materials, which he proposes to include in the record on appeal). Due to lack of clarity in the designation of matter, Respondent was unaware Appellant was attempting to include the transcript of magistrate court proceedings until Appellant's initial reply brief discussed this issue. Respondent believed the reference in the designation was a reference to the circuit court transcript.

III.

Since the transcript of the magistrate's proceedings was not provided to the circuit court judge, it is not proper for inclusion in the record on appeal in the instant appeal. Under Rule 210(c), SCACR: "The Record shall not, however, include matter which was not presented to the lower court or tribunal." Quite simply, Nilson is impermissibly attempting to put facts before this Court that he failed to make available to the circuit court. I'On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("Imposing preservation requirements on the appellant is meant to enable the lower court to rule properly after it has considered all relevant **facts**, law, and arguments" (emphasis added)); White, supra. Since the designation of matter is not in compliance with this rule, the designation of matter should be struck, with direction that the transcript of the magistrate court proceedings shall not be included.

IV.

Respondent also moves to hold all time-lines in abeyance until this Court rules on the State's motion.

V.

WHEREFORE, Respondent prays that this Court strike Appellant's Designation of Matter, and require Appellant to submit a new Designation of Matter in compliance with Rules 209 and 210, SCACR, and further requests that all filing deadlines be held in abeyance pending resolution of this motion; and for such other and further relief as the Court may deem just and proper.

[SIGNATURE BLOCK APPEARS ON FOLLOWING PAGE]

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
Bar # 68571

BY: 
DAVID SPENCER

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ATTORNEYS FOR RESPONDENT

January 28, 2015

STATE OF SOUTH CAROLINA
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The Honorable Benjamin H. Culbertson, Presiding Judge

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Appellate Case No: 2014-000632

THE STATE,

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KYLIE NILSON,

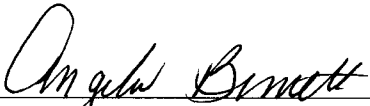
Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Motion to Strike on appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, M. Gregory McCollum, Esquire, 1012 38th Avenue North, Suite 202, Myrtle Beach, SC 29577.

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

This 28th day of January, 2015.



ANGELA BENNETT
Administrative Assistant

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Columbia, SC 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

January 28, 2015

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

Re: The State v. Kylie Nilson
Appellate Case No: 2014-000632

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Motion to Strike along with proof of service in the above-referenced case.

Sincerely,

David Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/ab
Enclosures

cc: M. Gregory McCollum, Esquire
Ms. Trisha Allen

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