

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Chesterfield County
The Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2014-000569

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MAR 12 2015

SC Court of Appeals

THE STATE,

Respondent,

v.

JULIUS CURRY,

Appellant.

MOTION TO REMAND FOR RECONSTRUCTION OF THE RECORD

Respondent State of South Carolina previously moved to hold the deadlines in the above captioned matter in abeyance pending receipt of additional portions of the trial transcript. That Motion is still pending. Respondent now moves to remand this matter to the circuit court for reconstruction of those portions, and renews its request that the matter be held in abeyance. The basis for Respondent's Motion is set forth below.

The issue on appeal involves the admissibility of jail phone call recordings played for the jury. The trial transcript merely noted the recordings were played, and did not include transcriptions of the recordings. The State has diligently attempted to obtain transcription of the recordings, but counsel has now learned the court reporter did not leave her recording equipment on while the recordings were played in court, and the

original recordings can no longer be retrieved in any way from the company that operates the jail's recording system.

Appellant asserts this Court cannot determine if the recordings had any probative value or were unduly prejudicial because the recordings are not "in evidence." The transcript indicates three recordings were played in court before the jury. As to each recording, the transcript states "an audio recording was played for the jury in open court." (Trial Transcript, pp. 161-165, attached hereto as Exhibit A).

During Appellant's closing argument, counsel referenced the recordings and told the jury "if you want to listen to them again the court reporter has got them," and "[t]hat testimony is in evidence." Counsel then discussed the substance of the recordings, including which party did most of the talking during the calls. (Trial Transcript, p. 217, attached hereto as Exhibit B).

The State also discussed the recordings during closing, and told the jury "the recording is in evidence and can be replayed or read back." (Trial Transcript, pp. 236-237, attached hereto as Exhibit C). In short, the transcript makes it clear both Appellant and the State believed the court reporter captured the recordings as they were played in court, and therefore, the recordings were part of the record before the circuit court and available for the jury's consideration.

Since the sole issue on appeal relates to the recordings, the State submits reconstructing the substance of the recordings played in open court is mandated in order for the appellate courts to meaningfully consider the merits of Appellant's arguments. Accordingly, Respondent moves to remand the case to the circuit court for appropriate proceedings to reconstruct those portions of the record. Respondent further renews its

motion to hold all deadlines in this appeal in abeyance pending resolution of this issue.

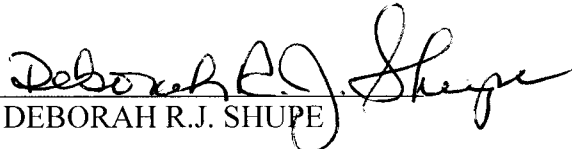
The undersigned certifies she informed opposing counsel of this motion by email.

Respectfully submitted,

ALAN WILSON
Attorney General

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By: 
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ATTORNEYS FOR RESPONDENT

March 12, 2015

1 THE COURT: Okay.

2 (WHEREUPON, State's Exhibit One played in open Court
3 for the jury.)

4 BY MR. REDMOND:

5 Q. It that the end of the subsequent portion?

6 A. Yes.

7 Q. Okay. And, again, was this interview done at the
8 hospital?

9 A. It was done at the hospital, yes.

10 Q. Now, we also talked about some calls from the jail,
11 and let me just ask you some foundational questions about
12 how that process works. Now, a phone calls being made out
13 of the jail by inmates, can they be recorded?

14 A. They are recorded.

15 Q. They are recorded?

16 A. Yes. Yes.

17 Q. And how does that process work?

18 A. What they do is that buy phone cards from the County
19 Jail and they type in a code that's on the back of the
20 phone card and they make the phone call.

21 Q. Excuse me. And if, with those calls being recorded,
22 were you able to access any calls recorded by the
23 defendant?

24 A. Yes, we accessed several calls from him.

25 Q. And I think at the beginning of each of those calls

1 is there a warning about the call being monitored or
2 recorded?

3 A. That is correct.

4 Q. Okay. Now, again, did you listen to any phone calls
5 regarding the defendant?

6 A. Yes, I did.

7 Q. Okay. And there are, I think, four particular areas
8 that we're going to want to get into regarding those
9 times. But before I have you step down and discuss those
10 matters we -- you are using your laptop to hear these; is
11 that correct?

12 A. That is correct. That's my Department issued laptop.

13 Q. Okay. And I don't actually have a disk drive or a
14 C.D. that I can actually put into the computer or what
15 not; is that correct?

16 A. That is correct.

17 Q. And I think in talking with you you were not able to
18 do it in that form based upon the software. But, again,
19 is this on your computer accurate as to what was produced
20 by the jail?

21 A. Yes, is that correct. I have a website that I go to
22 that is secured. That's what we use. I have my own
23 issued user name and my own password that I can only get
24 into that. Anybody in my unit, all my detectives can get
25 into it. They are issued user names and passwords.

1 Q. All right.

2 MR. REDMOND: If I could at this point, Your Honor,
3 with the Court's permission I would ask that Lieutenant
4 Jordan step down and publish this for the jury at this
5 time?

6 MR. SWILLEY: Your Honor, I'm going to object under
7 my previous objections of Rule 403 as well as the Rule of
8 Hearsay in regards to the other parties speaking on these
9 recording. Please note my objection.

10 MR. REDMOND: And, Your Honor, we would simply say
11 that it is relevant because the portions that we are going
12 to be talking about address calls made to Ms. Marshall
13 Wright whose still here in the courtroom in reference to
14 this case and her testimony or non-testimony regarding
15 this case. So we would assert that they are very relevant
16 in this particular matter.

17 THE COURT: All right. Objection is overruled. Go
18 ahead.

19 MR. REDMOND: Thank you, Your Honor. This first
20 call, Your Honor, was made on the 13th of September of
21 2013. And, Your Honor, if you will indulge us. Because
22 of the nature of this system we have to physically work it
23 up to that spot. We ask the Court and the jury's
24 patience.

25 MR. SWILLEY: And, Your Honor, to preserve the record

1 I would also object to the fact nothing is in evidence at
2 this point of the actual recording as well. I've made
3 that objection as well.

4 THE COURT: All right. Noted. I overrule it. Since
5 there is no proffer here if I find a problem pops up I
6 will have to step in. There could be ramifications.

7 MR. REDMOND: We are trying to guard against that so
8 we sort of set the parameters as it relates to admissible
9 evidence, Your Honor. Your Honor, what we are going to
10 do, just for the record, is play the first part where it
11 talks about the admonition about the phone call being
12 recorded.

13 (WHEREUPON, an audio recording was played for the
14 jury in open Court.)

15 MR. REDMOND: That concludes that call. The next
16 call is a little bit further and we're going to move a
17 little further on, Your Honor. While he's doing that,
18 Your Honor, if I can just inquire to make sure that the
19 jurors can actually hear what's going on. Judge, may we
20 approach, please?

21 (WHEREUPON, a bench conference was held off the
22 record in the presence of the jury, but out of the
23 hearing of the jury.)

24 MR. REDMOND: The next call, Your Honor, I think is
25 on the 17th. It is on the 17th of September.

1 (WHEREUPON, an audio recording was played for the
2 jury in open Court.)

3 MR. REDMOND: And the last call, Your Honor, is on
4 the 21st of September.

5 (WHEREUPON, an audio recording was played for the
6 jury in open Court.)

7 MR. REDMOND: And, Your Honor, that would conclude
8 all of these jail recordings. And at this point, Your
9 Honor, I don't have anything further for Lieutenant
10 Jordan.

11 BY MR. REDMOND:

12 Q. Please answer any questions Mr. Swilley may have for
13 you.

14 MR. SWILLEY: No cross-examination, Your Honor.

15 THE COURT: You may step down.

16 MR. REDMOND: Beg the Court's indulgence just one
17 moment. Your Honor, with that the State would
18 respectfully rest its case.

19 COLLOQUY

20 THE COURT: Ladies and gentlemen of the jury, if
21 y'all will step back to your jury room, please I have to
22 take up some matters of law.

23 (WHEREUPON, the jury panel was excused from the
24 courtroom at 3:25 p.m.)

25 THE COURT: Anything for the record.

EXHIBIT A

EXHIBIT B

1 prove. Okay. Think about it. When you go through
2 everything that was said think about why it's being said,
3 why the question was asked and what they are trying to
4 prove. What are they trying to prove? Are they trying to
5 prove something in the indictment or trying to make
6 something appear a certain way?

7 The thing that comes to mind is known as jail calls.
8 If we go back and talk about those jail calls, and you
9 will have -- if you want to listen to them again the court
10 reporter has got them. That testimony is in evidence. If
11 you want to listen to those jail calls who was talking the
12 most on those jail calls? Whose voice did you hear mostly
13 on those jail calls? It's Marshell. He is talking to
14 Marshell who at the time was his girlfriend, who
15 apparently doesn't want him to be prosecuted.

16 He was trying to tell her, "Look, just do what you
17 got to do. Get me out of here. I don't like it." The
18 reason that that was put before you is to make Julius look
19 bad. Not to make him look guilty, but to make him look
20 bad. Okay. There are some things that are just going to
21 make you look bad like the fact that you were using drugs
22 and drinking that day. That makes him look bad, but that
23 doesn't mean -- that doesn't have any bearing on whether
24 or not he is guilty of anything. It just makes him look
25 bad. That's some of the things I want you to consider

EXHIBIT C

1 Well, let's look at that for a minute. When you talk
2 about credibility issues, we get to the jail calls. And
3 Mr. Swilley tried to explain some saying, "Well, who is
4 doing most of the talking," but who is pulling the
5 strings? Who is issuing the directions? Who is the one
6 making the direct request? Who does what? In order
7 words, remember, he talks about, well, don't show up. If
8 you don't show up if there is no victim there is no crime.
9 That's the defendant talking.

10 Well, the defendant is saying, "Get in touch with
11 Wayne Jordan, Lieutenant Jordan, so that we can get this
12 thing straight and we can talk to him and we can be
13 together. And remember he wanted it so they could be
14 together to verify their stories. That's the defendant
15 talking. So I would say that Mr. Swilley, in that regard,
16 it doesn't matter what the quantity of what is being said.
17 It's the quality. And the quality that shows you that
18 this defendant was trying to orchestrate and lie his way
19 out of that; that prize goes to the defendant.

20 But I submit that I am confident enough to see that
21 you are smart enough not to let that fly because I think
22 it's obvious that the defendant was trying to manipulate
23 Ms. Wright, to manipulate her daughter to lie so that he
24 could get off on these charges. That's clear. And,
25 again, as Mr. Swilley indicated, the tape is in evidence.

1 Excuse me. The recording is in evidence and can be
2 replayed or read back.

3 And then you look at when you talk about credibility
4 issues with the defendant, and you talk about the fact
5 that he gets up here and he tries to make it seem like,
6 oh, I dropped the knife at the time. I dropped the knife
7 when he went, and they just beat me up. And speaking of
8 the injuries, and I think Lieutenant Jordan testified to
9 the fact, and you got the pictures. There is no denying
10 it, and the officers in their report they testified, yeah,
11 we hit him. Well he's got a knife, he is struggling.

12 And let's be honest. They could have killed him, but
13 you know, when I talked about law enforcement officers and
14 what not we always want to second guess and judge, but
15 they always have a split second to make a decision. But
16 despite everything that that man did that night to Ms.
17 Wright, both Ms. Wrights, to Sergeant Coombs and to Dana
18 Wallace, despite everything, they preserved his life.
19 They didn't take his life.

20 And you know what, there should be some credit given
21 to that because as Sergeant Coombs said under the
22 circumstances, based on his training, based on what they
23 are taught he had every reason to engage in deadly force
24 but he didn't. He didn't. And you know what, that counts
25 for something.

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THE STATE,

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v.

JULIUS CURRY,

Appellant.


PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Motion to Remand for Reconstruction of the Record on Appellant by depositing a copy in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

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

This 12th day of March, 2015.



SALLY B. ELLISON
Administrative Assistant

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ALAN WILSON
ATTORNEY GENERAL

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SC Court of Appeals

Kathrine H. Hudgins
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Re: The State v. Julius Curry
Appellate Case No. 2014-000569

Dear Ms. Hudgins:

Enclosed is a copy of the Motion to Remand for Reconstruction of the Record, with proof of service, in the above-referenced case. This is the Motion referenced in my email earlier today. It also renews our motion to hold in abeyance.

Sincerely,

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/sbe

Enclosure

cc: The Honorable Jenny A. Kitchings (original and 2 copies enclosed)
Victim Services (with enclosure)