

INITIAL BRIEF OF APPELLANT
THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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MAR 30 2015

SC Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No, 2013-CP-26-00432

The State

Respondent

vs.

Benny L. Webb

Appellant

Benny L. Webb

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(803) 972-3613

Appellant, Pro Se

STATEMENT OF ISSUE ON APPEAL

1. DID THE TRAIL COURT ERR IN ADMITTING A TAPE RECORDING WHEN THE STATE, AS WELL AS THE PARTY, ADMITTED THAT THE TAPE HAD BEEN ALTERED AND EDITED, WITH DELETIONS MADE AND WAS NOT COMPLETE. FURTHER, THAT THE TAPE SHOWN IN COURT WAS NOT AN ORIGINAL AND THE PARTY COULD NOT IDENTIFY IT EVEN AS A DUPLICATE OF THE ORIGINAL SINCE NO ORIGINAL HAD EVER BEEN SUBMITTED INTO EVIDENCE. ADMISSION OF THE TAPE IS CONTRARY TO THE RULES OF EVIDENCE, INCLUDING THE CHAIN OF CUSTODY AND RULE 901, 401 AND 403.

STATEMENT OF THE CASE

THIS IS AN APPEAL OF THE CONVICTION OF, BENNY L. WEBB, FROM THE Horry COUNTY MAGISTRATE COURT, DATED JANUARY 10, 2013 AND AFFIRMED BY CIRCUIT COURT JUDGE D. CRAIG BROWN ON MAY 14, 2014.

FACTS

The current appeal is from a conviction related to an incident that occurred on January 31, 2012 at the Atlantic Beach Town Hall. On that date, Paul Curry, drove to the Atlantic Beach Town Hall for the purpose of requesting a copy of Atlantic Beach's contract for legal services.

After Curry made his request, the town hall secretary asked him to sign in). Curry refused, and Benny Webb, the acting town manager at the time and appellant in this case, then came out of his office and in an attempt to protect the town employees demanded that Curry leave. Curry refused, and did not leave until he was asked by a police officer. (Tr. 140). Mr. Webb raised his voice, and escorted Curry from the building. Upon entering the town hall building, Curry began using a digital audio recorder. (Tr. 47). The recording that was played in court, however, it was not the original tape, but an edited version that had been transferred to a cd optical disc. (Tr. 45). When questioned by the state about the recording. Curry admitted that the original recording was nearly 28 minutes long, whereas the recording that was admitted at trial was only 8 minutes long. (Tr. 48). An original was never provided to defendant's counsel, or the court. By the proponents own admission, the recording contained deletions of a material nature. (Tr. 48). Benny Webb also testified that the contents on the tape was different from what was said and that he knew that the tape was altered. (Tr, 141). Webb also testified that it was not the complete tape. (Tr, 142).

ARGUMENT

The issue in the instant appeal involves whether the court should have allowed a voice recording, which contained material alterations and deletions to be admitted into evidence at trial. A foundation must be laid in order for evidence to be admitted at trial. The South Carolina Rules of Evidence, specifically rule 901, require that evidence be authenticated before being admitted at trial. SCRE § 901, states that "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to

support a finding that the matter in question is what its proponent claims." In one of the leading cases on the admissibility of voice recordings, the court in *United States v. McMillan*, reaffirmed the court's decision in *United States v. McKeever*, 271, F.2d 669 (1959), where the court held that in order for a sound recording to be admitted, a foundation must be laid establishing that, among other requirements, the recording is authentic and correct, that changes, additions, or deletions have not been made in the recording, and that the conversation elicited was made voluntarily and in good faith, without any kind of inducements *United States v. McMillan*, 508F.2d 101 (1974). The current case involves a voice recording that was admitted into evidence despite a large portion of the original being deleted. In fact, the proponent of the recording admitted at trial that the recording was in addition to not being in its original format but had been reduced from being twenty eight minutes long to being only eight minutes long. The amount of editing that was done, makes the changes by its very nature material, which in turn goes to the authenticity and ultimately the relevancy of the evidence. According to SCRE Rule 401, relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evidence that cannot be properly authenticated due to material alterations or deletions, lacks relevancy because due to its suspect nature it does not cause a fact of consequence to be more or less probable. A voice recording that may or may not be an accurate portrayal of the actual event recorded does not tend to make a fact of consequence any more or less probable, because its accuracy cannot be properly weighed due to its incompleteness. That is the situation faced in the instant case. Mr. Curry decided to go to

Atlantic Beach Town Hall for questionable reasons, and upon arrival used a digital audio recorder to make a record of his visit. He then used the device to make a voice recording without the knowledge or consent of those he was recording. He then altered the recording and transferred it to a CD, distributed it to the media and then to the police in its altered state. The original was never offered at trial. The altered version contained material deletions, and should not have been admitted due to the fact that its alterations and deletions make it unable to be properly authenticated.

CONCLUSION

For the reason stated, the Court should reverse the judgment of the circuit court.

March 19, 2015

Respectfully submitted



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CERTIFICATE OF SERVICE OF INITIAL BRIEF

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CERTIFICATE OF SERVICE OF INITIAL BRIEF

I Certify that I have served the initial brief of appellant on J. Scott Hucks on March 30, 2015 by US certified mail by sending three(3) of them to him at 1301 2nd Avenue, Conway, South Carolina 29526.

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