

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY

J. Cordell Maddox, Jr., Circuit Court Judge

Trial Court Case No. 2014-CP-23-5969
Appellate Case No. 2015-000759

Billy Joe Cartrette, Appellant,

v.

South Carolina Department of Corrections, Respondent.

**THE RESPONDENT’S RETURN TO THE APPELLANT’S
“MOTION TO REMAND TO TRIAL COURT
UNDER SCACR 240 AND WHITEHEAD V. STATE”**

By a submission dated September 27, 2015, the Appellant, Billy Joe Cartrette [“Cartrette”], filed his “MOTION TO REMAND TO TRIAL COURT UNDER SCACR 240 AND WHITEHEAD V. STATE” in the above-captioned case.

The Respondent, the South Carolina Department of Corrections [“the Department”], by way of its instant return, opposes Cartrette’s motion, and, by doing so, it respectfully urges this Court to reject any effort by Cartrette to remand any aspect of this matter back to the circuit court for further proceedings.

I. CARTRETTE’S MOTION

Cartrette’s motion to remand consisted of only the following two (2) paragraphs:

NOW COMES Cartrette who **moves to remand** the appeal hearing on South Carolina Appellate Court Rules set forth above and Whitehead v.

State, 574 S.E.2d 200, 201 (2002) as [the Department] has filed a **meritless, mis-leading motion to strike item(s) (legal documents, etc.) [from Cartrette's designation of matter to be included in the record on appeal dated July 21, 2015];**¹ Whitehead cites [China v. Parrott], 162 S.E.2d 278 (1968). As Bureau of Labor Statistics was part of [Cartrette's "Complaint for Declaratory Judgment(s)."]

More Request(s) for Admission(s) had certificate of service so see attachment(s) (excerpts). [emphasis supplied].

A. FIRST PARAGRAPH OF CARTRETTE'S MOTION TO REMAND

As he acknowledged in his motion to remand, the Department, on September 21, 2015, filed a motion to strike 11 of the 19 items Cartrette proposed for inclusion in the record within his designation of matter dated July 21, 2015. As of the date of its instant return, the Department's September 21, 2015 motion to strike is still pending with the Court.

Cartrette asserted at the end of his above-quoted motion's first paragraph that "Bureau of Labor Statistics was part of" the "Complaint for Declaratory Judgment(s)" he filed with the circuit court on October 31, 2014. Cartrette provided no additional description of the item or items he referenced as "Bureau of Labor Statistics" anywhere within the two (2) paragraphs which comprised the entirety of his motion to remand.

Cartrette attached copies of the first two (2) pages of the "Complaint for Declaratory Judgment(s)" to his motion to remand. However, the phrase "Bureau of Labor Statistics" does not appear anywhere within the first two (2) pages of his complaint.

¹ By a submission dated September 27, 2015, Cartrette filed his "DESIGNATION OF [ADDITIONAL] MATTER TO BE INCLUDED IN THE RECORD ON APPEAL." In his submission dated September 27, 2015, Cartrette identified three (3) more items for inclusion in the record to go along with the 19 items he proposed for inclusion in his submission dated July 21, 2015. The Department has filed a separate motion to strike all three (3) items proposed for inclusion in the record by Cartrette in his designation of additional matter dated September 27, 2015.

Finally, Cartrette did not identify or otherwise describe any of the items he proposed for inclusion in his designation of matter dated July 21, 2015 as “Bureau of Labor Statistics.”²

Therefore, it is simply not possible for the Department or the Court to accurately identify or otherwise confirm exactly what materials Cartrette described when he referenced “Bureau of Labor Statistics” in the first paragraph of instant motion to remand.

B. SECOND PARAGRAPH OF CARTRETTE’S MOTION TO REMAND

Cartrette also attached two (2) additional pages to his motion to remand: the first page of a discovery request addressed to the Department’s undersigned counsel entitled “Plaintiff’s First Set of Request for Admission Rule 36(a) SCRCF” and the certificate of service associated with his discovery request dated January 20, 2015.

Cartrette apparently attached these items to support the second and final paragraph of his instant motion to remand. In contrast to the first page of his “Complaint for Declaratory Judgment(s),” neither of the two (2) pages described immediately above reflects a file-stamp affixed by the circuit court.

In his designation of matter dated July 21, 2015, Cartrette proposed the entirety of his “Request for Admission” for inclusion in the record in this case.³ In its September 21, 2015 motion to strike, the Department argued urged this Court to exclude Cartrette’s “Request for Admission,” because he did not “present” it to the circuit court as requested under South Carolina Appellant Court Rule [“SCACR”] 210(c).⁴

² Cartrette did not identify or otherwise describe any of the three (3) items he proposed for inclusion in his designation of additional matter dated September 27, 2015 as “Bureau of Labor Statistics.”

³ See item #4 identified as “1-20-15 Request(s) for Admissions.”

⁴ See the Department’s September 21, 2015 Motion to Strike, p. 4.

The final two (2) pages of the materials he attached in support of his instant motion to remand confirms that Cartrette did not file his "Request for Admission" dated January 20, 2015 to the circuit court. Accordingly, this Court, as urged by the Department in his September 21, 2015 motion, should not allow Cartrette to include his "Request for Admission" in the record he submits in the instant case.

C. TRUE MEANING OF CARTRETTE'S MOTION TO REMAND

The assertions from his instant motion, as confirmed by his four (4) pages of supporting materials, demonstrate that Cartrette filed his motion to remand in the hopes of returning to the circuit court and "presenting" to the circuit court some if not all 11 items identified in the Department's September 21, 2015 motion to strike.

Such an opportunity would allow Cartrette to "present" these items to the circuit court in satisfaction of SCACR 210(c). As the Department persuasively argues below, however, this Court should not afford Cartrette such an opportunity.

II. THE TWO (2) CASES CITED BY CARTRETTE IN HIS MOTION TO REMAND

In Whitehead v. State, 574 S.E.2d 200, 218 (S.C. 2002), the first case cited by Cartrette in his motion to remand, our Supreme Court articulated the following procedural history:

In 1992, petitioner's first PCR application was denied after an evidentiary hearing. Appellate review of that order was not sought. Petitioner subsequently filed a second PCR application alleging, among other things, an [*Austin v. State*, 409 S.E.2d 395 (S.C. 1991)] claim that his first PCR attorney had rendered ineffective assistance of counsel in failing to seek review of the 1992 PCR order. Following an evidentiary hearing on this second PCR application, the circuit court judge found petitioner's testimony credible that his first PCR attorney had failed to perfect certiorari despite petitioner's timely request. Accordingly, the second PCR judge concluded that petitioner was entitled to belated appellate review of the 1992 PCR order.

Our Supreme Court, 574 S.E.2d at 218 – 19, then described a problem confronted by the petitioner's counsel in Whitehead:

Petitioner timely sought certiorari to review this second PCR order. *See King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992) (appellate procedure in *Austin* matter). **In the course of preparing the appendix, petitioner's counsel learned that no transcript of the 1992 PCR hearing was available, and petitioned the Court to remand the matter so that the record from that hearing could be reconstructed. *See China v. Parrott*, 251 S.C. 329, 162 S.E.2d 276 (1968) (trial judge reconstructed record where court reporter records were unavailable).** The motion was denied, and the Court instructed the parties to brief "whether, in an instance such as this, a PCR applicant may be barred from seeking *Austin* review by the doctrine of laches." [emphasis supplied].

By its decision in Whitehead, 574 S.E.2d at 220, our Supreme Court, under China, granted the petitioner's motion, and it remanded the case back to the circuit court "for a hearing to **reconstruct** the first PCR record." [emphasis supplied].

Obviously, the Whitehead court cited and relied upon its earlier decision in China in reaching its decision. As is equally obvious, Cartrette also invoked China in motion to remand.

The China court described the issue it confronted as follows, 162 S.E.2d at 277:

Under the record and for the purposes of determining the issue in this appeal, the verdict of the jury constituted a finding that plaintiff's injuries and damage were proximately caused by Defendant's negligence or recklessness in the operation of his automobile and that plaintiff was not guilty of contributory negligence so as to bar her of recovery. The basic question in this appeal is whether there was any evidence to sustain these findings of the jury. Admittedly, if the evidence was reasonably susceptible of the inferences drawn by the jury, the verdict must stand. Only where the evidence gives rise to but one inference does the question become one of law for the court.

Preliminarily however, since it involves a dispute as to the issues which were submitted to the jury, and consequently affects our review of the record, we must first dispose of an appeal by the defendant from an order settling the case on appeal. **The question has arisen because portions of the stenographic notes of the trial proceedings were lost before they were transcribed by the court reporter.**

The complaint alleged that plaintiff's injuries were caused by the negligent and reckless conduct of defendant and originally sought both actual and punitive damages. However, it appears that during the trial plaintiff withdrew the demand for punitive damages and asked judgment for only actual damages. Dispute arises as to the form of such withdrawal and whether it operated to withdraw the issue of defendant's recklessness from the case. Of course, the presence or absence of an issue as to recklessness on the part of defendant would materially affect the degree of contributory negligence necessary to bar plaintiff of recovery. Plaintiff says that the demand for punitive damages was withdrawn without withdrawing the issue of defendant's recklessness and proposed that the record on appeal so show. **The defendant objected and the question of what transpired in connection with plaintiff's withdrawal of the demand for punitive damages was submitted to the trial judge to determine in order to settle the case for appeal.** [emphasis supplied].

The China court, 62 S.E.2d at 278, later offered the following observation:

Where there is a disagreement as to what the record on appeal should contain, the duty and responsibility of settling the question rests upon the trial judge. [citations omitted].

The China court, 162 S.E.2d at 278, then addressed the method by which the trial court resolved the problem with the record:

In order to settle the record on appeal, it became necessary for the trial judge to determine what transpired with reference to the withdrawal of the demand for punitive damages and the submission of the issue of recklessness to the jury. In doing so he properly considered the affidavits of counsel and the court reporter as to what happened. **The fact that the notes of the court reporter were lost** and the trial judge had no independent recollection of the incident under inquiry did not preclude him from determining the question upon the basis of the affidavits submitted. Their probative value was for him to determine and his conclusions thereabout are binding on the court. [emphasis supplied].

III. THE DEPARTMENT'S ARGUMENT IN OPPOSITION TO CARTRETTE'S MOTION TO REMAND

A. CASES OFFERED BY THE DEPARTMENT IN OPPOSITION TO CARTRETTE'S MOTION

In State v. Ladson, 644 S.E.2d 271, 271 (S.C. Ct. App. 2007), this Court presented the following procedural history:

Travis Anthony Ladson was convicted of first-degree burglary following a three-day trial. Ladson was sentenced on November 10, 2004, to prison for a non-parolable term of twenty-five years. Ladson timely appealed his conviction and sentence. In accordance with standard procedure, Ladson promptly requested the transcript of the trial from the court reporter. **Approximately ten months later, in August of 2005, the court reporter finally disclosed that there was no record of the trial court proceedings.**

Because of the complete absence of a transcript, Ladson moved this court to reverse the convictions and sentences and for a new trial. Based on the State's assurance that the record could be easily reconstructed, a judge of this court denied Ladson's motion and **remanded the matter to the trial court to reconstruct the record.** More than a year after the trial, the trial judge convened a hearing with trial counsel in an effort to **reconstruct the record.** [emphasis supplied].

In its decision in Ladson, this Court, 644 S.E.2d at 272, next described the issue it confronted regarding the record:

Ladson maintains the **reconstructed record** does not allow for meaningful review of his direct appeal. The State disagrees and asserts this court should find the record adequate for appellate review of the claims Ladson raised at the **reconstructed** hearing. [emphasis supplied].

In its analysis in Ladson, 644 S.E.2d at 273, this Court, relying upon China, Whitehead, and other cases, observed as follows:

South Carolina jurisprudence recognizes the trial court's authority to set the record for appeal. In [*China*], our supreme court held that **where a portion of the court reporter's notes were lost**, the trial judge properly considered affidavits from counsel and the court reporter in **reconstructing** the record. *See also Koon v. State*, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) (recognizing a court's power to **remand for a reconstruction hearing**), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 105, 610 S.E.2d 494, 501 (2005); [*Whitehead*], (finding that when **a transcript has been lost or destroyed**, an appellate court may **remand** to have the record **reconstructed**); *Dolive v. J.E.E. Developers, Inc.*, 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct.App.1992) (holding trial court did not err in granting property owner's request to **reconstruct** the record of zoning proceeding **where portions of original tape of hearing were incapable of being transcribed**). [emphasis supplied].

In Ladson, 644 S.E.2d at 273 – 74, this Court held as follows:

We conclude from *China* and its progeny, combined with a review of the law of other jurisdictions, that our supreme court would require a **reconstructed record on appeal** to allow for “meaningful appellate review.” [emphasis supplied].

In *State v. Serrette*, 654 S.E.2d 554, 554 (S.C. Ct. App. 2007), a decision it issued shortly after it issued *Ladson*, this Court confronted the following facts:

On October 12, 1994, Serrette was convicted *in absentia* for trafficking cocaine and possession with intent to distribute marijuana. A bench warrant was issued, and over ten years later, Serrette was arrested and sentenced to six years’ imprisonment for the cocaine charge and a concurrent four years’ imprisonment on the marijuana charge. After filing a notice of appeal, **Serrette learned his trial transcript had been destroyed pursuant to Rule 607(i), SCACR, which allows court reporters to reuse or destroy tapes of a proceeding after five years. On appeal, Serrette asks this court to remand for a reconstruction hearing.** The State opposes a remand and contends the case should be dismissed. [emphasis supplied].

In its analysis in *Serrette*, 654 S.E.2d at 555, this Court, relying upon *China*, *Ladson*, and another case, held as follows:

Serrette points out that our court has the authority to remand for a reconstruction of the record pursuant to [*China*]; however, such a remedy would undoubtedly be futile considering the passage of over ten years’ time between conviction and sentencing. [footnote omitted]. See [*Ladson*, 644 S.E.2d at 274] (“It is simply unrealistic and unreasonable to think that a trial judge and counsel can under these circumstances [the passage of fourteen months] - **reconstruct a proper record** that will permit meaningful appellate review, especially in light of our issue preservation rules.”). Furthermore, **Serrette’s own actions are the reason a transcript of the proceedings below is not available; this is not a situation where the court reporter’s equipment malfunctioned at trial leading to a loss of the trial transcript.** See *Deaton v. Leath*, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983). **We can divine no reason why Serrette is entitled to a reconstruction of the record when the destruction of the transcript resulted from his willful decision to remain a fugitive.** [emphasis supplied].

B. NO GROUNDS EXIST FOR THIS COURT TO GRANT CARTRETTE'S MOTION TO REMAND

Contrary to any assertion or argument he may offer in reply to the Department's instant return, Whitehead and China do not provide sufficient grounds upon which this Court should grant Cartrette's motion to remand.

Instead, the facts at issue in Whitehead, China, as well as Ladson are readily distinguishable from the facts associated with Cartrette's motion to remand. Cartrette has not and, for that matter, cannot allege or argue that the court reporter who covered the February 13, 2015 hearing conducted by the circuit court is unable produce a record of the proceedings (i.e. Ladson), that any portion of the court reporter's notes for the February 13, 2015 proceedings before the circuit court have been lost (i.e. China), or that no transcript of the February 13, 2015 proceedings before the circuit court is available (i.e. Whitehead).

As reflected by Cartrette's designation of matter dated July 21, 2015, as well as the correspondence between Cartrette and the Clerk of this Court, the entirety of the transcript associated with the February 13, 2015 proceedings conducted by the circuit court exist and are ready for inclusion into the record for the instant case.

This reality is further evidenced by the designation of matter filed by the Department on September 21, 2015, in which the Department proposed for inclusion in the record in the instant case the entirety of the transcript associated with the February 13, 2015 proceedings conducted by the circuit court.

Moreover, the Department, unlike Cartrette, proposed in its September 21, 2015 designation of matter that the sole exhibit introduced by Cartrette at the February 13, 2015 hearing conducted by the circuit court also be included in the record for the instant case.

Thus, absolutely no need whatsoever exists for this Court to remand any aspect of the instant appeal back to the circuit court so that the circuit court may *reconstruct* the record. All of the proceedings conducted by the circuit court on February 13, 2015 currently exist, and they are ready to be included in the record in this matter.

Instead of *reconstructing* the record in the instant matter, the Department respectfully submits that Cartrette filed his motion to remand so he may afford himself the opportunity to *construct* a record in the instant case. The Department again respectfully argues that Cartrette filed his motion to remand to the circuit court so he can attempt to introduce to the circuit court some if not all 11 items identified in the Department's September 21, 2015 motion to strike.

No reason exists for Cartrette to move this Court to remand this case back to the circuit court *other than* his recognition that this Court will likely grant the Department's September 21, 2015 motion and, by doing so, this Court is likely to exclude all of the 11 items identified by the Department in its motion.

Therefore, Cartrette is attempting to cure his own failure to introduce these 11 items into the record when his case was pending before the circuit court. For the reasons it provided above, the Department respectfully argues that Cartrette should not be allowed to go back before the circuit court and cure his own failure to introduce these items into the record.

IV. THIS COURT SHOULD GRANT THE ENTIRETY OF THE DEPARTMENT'S SEPTEMBER 21, 2015 MOTION TO STRIKE

To date, Cartrette has not filed a return to the Department's September 21, 2015 motion to strike in which he presented any specific or even general opposition to the Department's arguments in supporting of striking 11 of the 19 items he proposed for inclusion into the record for the instant case.

Instead, Cartrette filed his instant motion to remand, and, in doing so, Cartrette only offered a conclusory argument that the Department's September 21, 2015 motion to strike was "meritless" and "misleading." Accordingly, the Department respectfully submits that Cartrette has not and does not oppose the Department's September 21, 2015 motion to strike.⁵

As illustrated above, Cartrette, by filing his motion to remand, has tacitly admitted that he did not "present" to the circuit court the 11 items subject to exclusion by the Department's September 21, 2015 motion to strike as required under the provisions of SCACR 210(c). Therefore, this Court should grant the entirety of the Department's September 21, 2015 motion to strike.⁶

V. CONCLUSION

For all of the foregoing reasons, the Department respectfully urges this Court to both (1) deny Cartrette's motion to remand dated September 27, 2015 and (2) grant the entirety of the Department's September 21, 2015 motion to strike 11 of 19 items Cartrette proposed for inclusion in the record for the instant case his designation of matter dated July 21, 2015.

⁵ The final sentence of SCACR 240(e) provides that "[f]ailure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition."

⁶ This Court should likewise grant the Department's motion to strike the three (3) items Cartrette identified in his designation of additional matter dated September 27, 2015.

RESPECTFULLY SUBMITTED,



October 19, 2015

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM GREENVILLE COUNTY

J. Cordell Maddox, Jr., Circuit Court Judge

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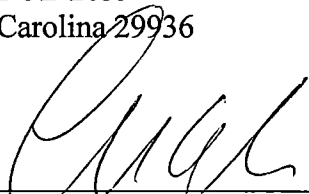
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PROOF OF SERVICE

I certify that I have served **THE RESPONDENT'S RETURN TO THE APPELLANT'S "MOTION TO REMAND TO TRIAL COURT UNDER SCACR 240 AND WHITEHEAD V. STATE"** on the above named *pro se* Appellant by mailing a copy to him, first class postage pre-paid, at the following address:

Billy Joe Cartrette, #122434
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Ridgeland, South Carolina 29936

October 19, 2015



Lake E. Summers