STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2015-002009

THE STATE,

Respondent,

v.

WAYNE BEECHER CARTER,

Appellant.

REPLY TO
RETURN TO MOTION TO STRIKE

Respondent ("the State"), through its undersigned counsel, would respectfully show unto the Court as follows:[1]

I.

In asking this Court to deny the State's motion through his Return to the State's Motion to Strike, Appellant – in addition to making a number of non-substantive remarks – does **not** contend the incident report the State is asking this Court to strike from Appellant's designation of matter was actually presented to the trial judge as required for that matter to be included in the

[1] Although the State was correctly identified as the Respondent in this matter in the caption to the State's Motion to Strike, undersigned counsel for the State inadvertently referred to the State as the Appellant a single time in the body of the motion. Undersigned counsel for the State apologizes to the Court and to Appellant for any confusion or inconvenience that resulted from that scrivener's error.

Record on Appeal. See Rule 210(c), SCACR ("The Record shall not . . . included matter which was not presented to the lower court or tribunal."). Instead, Appellant simply notes the incident report was referenced by the parties on several occasions during the suppression hearing before asking this Court to deny the State's motion to strike on that basis.

II.

Significantly, contrary to Appellant's position in his Return, a reference to an exhibit by counsel – or even the presentation of testimony in regard to the substance of an exhibit – does **not** establish the exhibit itself was presented to the trial judge. In Appellant's case, nothing appearing in the transcript of the record establishes the incident report Appellant seeks to include in the Record on Appeal was actually presented to the trial judge, and, in fact, the trial judge's questioning of counsel about the contents on the incident report on several occasions during the trial proceedings demonstrated the trial judge was **not** actually presented with the document itself to aid in resolution of the issues raised during Appellant's trial. (Tr. pp. 64-65; p. 141).[2] Accordingly, as the South Carolina Appellate Court Rules limit an appellate court to considering only the matter properly presented to the trial court, the incident report improperly designated by Appellant cannot properly be included in the Record on Appeal or considered for the first time by the appellate court in deciding Appellant's case on appeal.[3] See Tant v. Guess, 37 S.C. 489, 512-513, 16 S.E. 472, 480 (1892) ("[I]f the purpose was to ask this court to consider facts not presented to the Circuit Court, . . . then it is clear beyond dispute that we cannot consider such facts. For, as is said by Taney, C. J., in Russell v. Southard, 12 How., at page 159: 'According to the practice of the Court of Chancery from its earliest history to the present time, **no paper not**

[2] The relevant pages from the trial transcript have been attached to the State's Reply as Attachment "A."

[3] Notably, the fact the incident report itself cannot properly be included in the Record on Appeal will in no way prevent the appellate court from considering the same matter considered by the trial judge in resolving the issues raised in Appellant's case, which included counsel's remarks regarding the substance of the incident report.

before the court below can be read on the hearing of an appeal.' This court has, in numerous cases, recognized and affirmed this doctrine." (emphasis added)); State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) ("Morris' statement was not presented to the lower court and cannot properly be included in the Record on Appeal."); see also Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) ("[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State.").

III.

Based on the foregoing coupled with the arguments raised in the State's Motion to Strike, the State respectfully asks this Court to grant its motion, strike the improperly-designated incident report from Appellant's Designation of Matter, and require Appellant to file the Record on Appeal without including the improperly-designated matter. Furthermore, the State requests this Court to hold the time period for the filing and service of the Record on Appeal in abeyance until this matter has been ruled upon.

WHEREFORE, the State prays that this Court will strike the improper matter designated by Appellant in his Designation of Matter; require the filing of the Record on Appeal omitting the improperly-designated matter; hold the time period for service and filing of the Record on Appeal in abeyance pending a ruling on this motion; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Assistant Attorney General
S.C. Bar No. 100108

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Megan Harrigan Jameson

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May 27, 2016

ATTACHMENT "A"

THE COURT: Okay. In materials that were sent out in January of 2015, was the existence of a statement disclosed?

MR. BURR: Couldn't hear your question, your Honor.

THE COURT: Did they disclose the statement in the January responses?

MS. BLUNDY: Yes and no. Let me explain.

THE COURT: Okay.

MS. BLUNDY: The incident report was provided. In that incident report it does state that the defendant had consented to the search, but the actual statement of the consent was not provided.

THE COURT: All right.

Mr. Burr, is that correct?

MR. BURR: No, your Honor, it is not.

THE COURT: What does the incident report say?

MR. BURR: The incident report says that the officer asked for consent to search the truck. No response is mentioned. Then it says, "While conducting the search." That's nothing -- there's nothing in my file.

In fact, the part I was arguing about was from Officer Sutherland. I didn't even know he had talked to my client the following day. There's been no

notice -- I'll let the prosecutor finish her response.

THE COURT: Is that correct, Ms. Blundy; is that what the incident report says?

MS. BLUNDY: That is correct, your Honor. I thought it did actually state that there was consent, but now that he points it out, it does not state that. Although there also is a video. And to me it is clear from the video along with what he wrote about consent to search is in the report. I did not think we would be debating this here this afternoon.

THE COURT: But didn't you just say the video doesn't have any audio?

MS. BLUNDY: It does not.

THE COURT: Okay. When was the existence of the second statement revealed to Mr. Burr?

MS. BLUNDY: That I was not aware of until a few days ago, and I actually sat down with Officer Sutherland, and he was able to disclose to me that statement. Prior to that, I had no knowledge of that statement being made either. As soon as I did find out that that statement was made during that discussion, I turned that over to the defense.

THE COURT: All right. Is that statement in any incident reports or supplemental reports?

MS. BLUNDY: It is not.

(WHEREUPON, the jury exited open court at 11:24 a.m.)

THE COURT: Mr. Burr, you have an objection?

MR. BURR: Yes, your Honor. We have been given very thorough chain of custody information on the drugs in this case. I have received nothing on chain of custody, only what's in this bag, what's in the bag, where it was kept, who's responsible for it. There's no chain at all.

THE COURT: What evidence was submitted to the defense regarding chain of custody for the other items?

MS. BLUNDY: Your Honor, I don't know that there has to be a formal written chain of custody at trial. It just needs to be proven who handled it and through testimony.

THE COURT: Were the other items noted in the incident report?

MS. BLUNDY: Several of the items were. Several of the items were not.

THE COURT: What -- what items were not noted in the reports provided to the defense?

MS. BLUNDY: The spoon -- well, these items were: The spoon, the baggies, and the scale. There were other contents to the bag, but we did have an opportunity to review them prior to trial. We all went

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PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Reply to Return to Motion to Strike on Respondent by sending two copies of the same to:

Robert M. Pachak, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 27th day of May, 2016.

Megan Harrigan Jameson

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ALAN WILSON
ATTORNEY GENERAL

May 27, 2016

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: State v. Wayne Beecher Carter – Appellate Case No. 2015-002009

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Reply to Return to Motion to Strike, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Megan Harrigan Jameson

Megan Harrigan Jameson
Assistant Attorney General

MHJ/
Enclosures

cc: Robert M. Pachak, Esquire
Victim Services