

STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM MARLBORO COUNTY
William H. Seals, Jr., Circuit Court Judge

RECEIVED

JUN 06 2016

THE STATE,

SC Court of Appeals

RESPONDENT,

V.

PHYLLIS A. LANE,

APPELLANT

APPELLATE CASE NO. 2015-000708

MOTION TO VACATE APPELLANT'S
CONVICTION AND SENTENCE
AND REMAND FOR A NEW TRIAL

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, undersigned counsel requests an order vacating Appellant's conviction and sentence and remanding the case for a new trial. In support of this motion, Appellant provides this Court with an Order signed by the Honorable William H. Seals, Jr., indicating the parties agreed the record could not be reconstructed in a manner to permit meaningful appellate review. Judge Seals agreed with the parties and signed an Order to this effect on May 23, 2016, recommending this Court remand the case for a new trial. (Exhibit A: Signed Order).

On February 3, 2015, the Marlboro County Grand Jury indicted Appellant for one count of breach of trust with fraudulent intent valuing more than \$2,000 but less than \$10,000 for converting to her own use approximately \$,4700 belonging to her mother, Mildred Gause. (Exhibit B: Indictment).

On March 17, 2015, Appellant stood trial before Judge Seals and a jury. Julie Swilley represented Appellant and Elizabeth Munnerlyn represented the State. The jury found Appellant guilty as charged and Judge Seals sentenced Appellant to five years imprisonment, suspended on the completion of five years of probation and the payment of \$4,700 in restitution. (Exhibit C: Sentencing Sheet).

On November 29, 2015, Appellant filed a motion to remand for record reconstruction. Due to an unspecified mechanical error, the court reporter did not translate the following portions of the record:

- a. The Court's introductory remarks;
- b. The State's opening statement;
- c. Appellant's opening statement;
- d. The State's direct examination and Appellant's cross-examination of Mildred Gause;
- e. The State's direct examination of McColl Police Chief Tommy Langley, the lead investigator; and
- f. Two portions, of indeterminate length, of the directed verdict arguments.

On November 23, 2015, Respondent sent a letter to this Court in lieu of a formal response, expressing "no objection" to the request to reconstruct. On January 13, 2016, this Court granted the motion to remand for reconstruction of the record.

Pursuant to this Court's order, a hearing was held on March 21, 2016, in Marlboro County, South Carolina. Appellant was present and represented by undersigned counsel. Elizabeth Munnerlyn represented the State. Also present were Mildred Gause, Appellant's trial attorney Julie Swilley, and Chief Langley.

Counsel for Appellant and Counsel for the State agreed on the record that, due to the amount of testimony and arguments missing from the trial transcript, the record could not be adequately reconstructed for an effective appeal. For the reasons set forth in the order accompanying this motion, Judge Seals agreed with the parties. (Exhibit A).

When a trial transcript has been lost or destroyed, the Court may vacate the conviction and sentence and remand for a new trial if meaningful appellate review is not possible. See *Koon v. State*, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002); *State v. Ladson*, 373 S.C. 320, 325, 644 S.E.2d 271, 273-274 (Ct. App. 2007).

In light of the court reporter's inability to produce a transcript of Appellant's trial and the parties agreement, along with the trial judge's determination, that the record cannot be reconstructed in a way to permit meaningful appellate review, Appellant requests this Court order a new trial in her case.

WHEREFORE, the undersigned counsel requests this Court set aside Appellant's conviction and sentence and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", written over a horizontal line. The signature is somewhat stylized and overlaps the line.

John H. Strom
Appellate Defender

Attorney for Appellant

This 6th day of May, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marlboro County

Honorable William H. Seals, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,


V.

PHYLLIS ANN LANE,

APPELLANT.

CERTIFICATE OF SERVICE

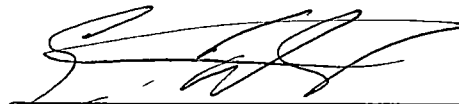
The undersigned attorney hereby certifies that a true copy of the motion to vacate appellant's conviction and sentence and remand for a new trial in the above referenced case has been served upon opposing counsel, J. Benjamin Aplin, Esquire, this 6th day of June, 2016.



John H. Strom
Appellate Defender

Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 6th day of June, 2016



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.

EXHIBIT A

STATE OF SOUTH CAROLINA)
COUNTY OF MARLBORO)
STATE OF SOUTH CAROLINA,)
V.)
PHYLLIS LANE,)
DEFENDANT)
_____)

IN THE COURT OF GENERAL SESSIONS
FOURTH JUDICIAL CIRCUIT

No.: 2015-GS-000708

ORDER FROM THE TRIAL COURT
ON REMAND FROM APPELLATE
COURT TO RECONSTRUCT
THE RECORD

Pursuant to the Order remanding this case to reconstruct the Record, a hearing was held on March 21, 2016 in Marlboro County. Appellant was present and represented by John H. Strom and Julie Swilley. Elizabeth Munnerlyn represented the State. Also present were Mildred Gause, the victim and Appellant's mother, and McColl Police Chief Tommy Langley, the lead investigator.

Counsel for Appellant and Counsel for Respondent agreed on the Record that, due to the amount of testimony and arguments missing from the trial transcript, the Record could not be adequately reconstructed for an effective appeal. This Court agrees.

Appellant stood trial on March 17, 2015 and was convicted of breach of trust with fraudulent intent valuing more than \$2,000 but less than \$10,000 for converting to her own use approximately \$4,700 of her mother's money. Whether Ms. Gause had the specific intent to entrust Appellant with her money was argued extensively during the defense's motion for a directed verdict of acquittal. At the reconstruction hearing, Counsel Strom stated that the denial of the directed verdict motion is likely to be raised on appeal.


Large portions of Appellant's trial were not recorded due to an unspecified mechanical error. Most of this Court's opening remarks, the opening arguments of both counsels, all of Ms.

Gause's testimony, and the majority of Chief Langley's testimony is missing. As are two excerpts of indeterminate length from the directed verdict arguments.

While the Court would be able to recreate its introductory remarks; neither Counsel Swilley nor Counsel Munnerlyn remembered their opening arguments in detail. Further, counsels stated that they do not remember the specifics of the witness' missing testimony or what objections, if any, they made. Similarly, Chief Langley indicated that he did not recall his testimony and did not recall his investigation into the case. Ms. Gause was also uncertain about what she specifically testified to at the original trial.

In addition, Ms. Gause stated on the record that she does not wish to pursue this matter any further and does not wish for Appellant, her daughter, to face another trial. Since the trial, Appellant's probation was terminated at Ms. Gause's request. The restitution imposed during sentencing was converted to a civil judgment. Should the Court of Appeals remand this case, Ms. Gause and the State have consented on the record to a dismissal of the charge against Appellant. The civil judgment will remain in effect.

THEREFORE, with the agreement of counsel for all parties, this Court believes that the Record cannot be adequately reconstructed so as to allow for meaningful appellate review and recommends that the Court of Appeals remand the entire case for a new trial.



William H. Seals, Jr.
Circuit Court Judge

This 23 day of May, 2016
Marion, South Carolina

EXHIBIT B

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF

Marlboro

STATE

Phyllis Lane

INDICTMENT/CASE#: 2015 GS 34-0028

AW#: 2014A3420300131

Date of Offense:

S.C. Code §:

CDR Code #: 3423

AKA:

Race:

Sex:

Age:

DOB:

SS#:

Address:

City, State, Zip:

DL#

* SID#

CDL Yes No CMV Yes No Hazmat Yes No

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS

TO: Breach of Trust with Fraudulent Intent

In violation of § of the S.C. Code of Laws, bearing CDR Code # 3423

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS \$17-25-45

(CSC w/minor 1st or Lewd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (def.'s initials)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST:

Edward R. My 66284

Solicitor

SC Bar #

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the State Department of Corrections County Detention Center,

for a determinate term of 5 days/months/years or under the Youthful Offender Act not to exceed years

and/or to pay a fine of \$; provided that upon the service of days/months/years and or payment

of \$; plus costs and assessments as applicable; the balance is suspended with probation for 5

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are

incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:

The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State

Department of Corrections.

The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal

Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered

PTUP

Total: \$ 4700⁰⁰ plus 20% fee: \$

days/hours Public Service Employment

Payment Terms:

Obtain GED

Attend Voc. Rehab. Or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal consecutive weekly/monthly

pmts. of \$ Beginning

\$ Paid to Public Defender Fund

Other William B. Bunderhach

CLERK OF COURT

MARLBORO COUNTY

Appointed PD or appointed other counsel,

\$47.12 requires \$500 be paid to Clerk

during probation.

Presiding Judge

Judge Code:

Sentence Date

*Fine:	\$
§14-1-206 (Assessments 107.5%)	\$
§14-1-211 (A)(1)(Conv. Surcharge)	\$100
§14-1-211 (A)(2)(DUI Surcharge)	\$100
§56-5-2995 (DUI Assessment)	\$12
§56-1-286 (DUI Breath Test)	\$25
Proviso §7.9 (Public Def/Prob)	\$500
§14-1-212 (Law Enforce. Funding)	\$25
§14-1-213 (Drug Court Surcharge)	\$150
§50-21-114 (BUI Breath Test Fee)	\$50
§56-5-2942(J) (Vehicle Assessment)	\$40/ea
Proviso 90.5 (SCCJA Surcharge)	\$5
2% to County (if paid in installments)	\$
TOTAL	\$

Clerk of Court/Deputy Clerk

Court Reporter:

EXHIBIT C

WITNESSES

Heath Williams *HT*

Mccoll Police Department

Law Enforcement Case #:

284

WAIVER OF PRESENTMENT

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to:

Defendant

ARREST WARRANT NUMBER
2014A3420300131

ARRESTED ON: 2014-12-17

ACTION OF GRAND JURY

True Bill

Lisa Moore

Grand Jury Foreperson

Date

02/03/15

VERDICT

Petit Jury Foreperson

Date

MARLBORO COUNTY, S.C.

CLERK OF COURT

WILLIAM B. FUNDENBERG

2015 FEB 3 PM 1 00

DOCKET NUMBER:
2015-GS-34-0028

The State of South Carolina

County of Marlboro

COURT OF GENERAL SESSIONS

Term:
February 2015

THE STATE

vs.

Phyllis A Lane

INDICTMENT FOR

Breach/Breach of Trust with fraudulent intent,
value more than \$2,000 but less than \$10,000;
Penalty Statute 16-13-0230(B)(2); Felony Class
F

§16-13-0230(A)

CDR Code: 3423

A CERTIFIED
TRUE COPY

William B. Fundenberg

CLERK OF COURT
MARLBORO COUNTY

William B. Rogers, Jr., Solicitor

FILED

STATE OF SOUTH CAROLINA)

INDICTMENT FOR

COUNTY OF MARLBORO)

Breach/Breach of Trust with fraudulent intent, value more than \$2,000 but less than \$10,000; Penalty Statute 16-13-0230(B)(2); Felony Class F

§16-13-0230(A)

At a Court of General Sessions, convened on February 3, 2015, the Grand Jurors of Marlboro County present upon their oath:

BREACH OF TRUST WITH FRAUDULENT INTENT
(VALUE: OVER \$2,000 UP TO \$10,000)

CDR: 3423 16-13-0230(A)

That Phyllis A Lane did in Marlboro County on or about November 5, 2013, having been entrusted by the owner of Mildred Gause with the care, keeping, and possession of a MONIES IN THE AMOUNT OF 4700.00 valued at more than two thousand (\$2,000.00) dollars, but less than ten thousand (\$10,000.00) dollars, did feloniously convert and appropriate such property to his/her own use and purposes, with intent to deprive the owner thereof, in violation of Section 16-13-0230(B)(2), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


WILLIAM B. ROGERS, JR.
SOLICITOR



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

June 6, 2016

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED

JUN 06 2016

SC Court of Appeals

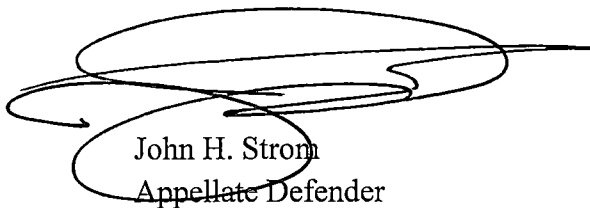
Re: State v. Phyllis Ann Lane, Appellate Case No. 2015-000708

Dear Ms. Kitchings:

Enclosed with this letter are an original and six copies of the motion to vacate Appellant's conviction and sentence and remand for a new trial along with the accompanying order from Judge Seals concluding that the record in the above-captioned case could not be adequately reconstructed so as to allow for meaningful appellate review.

Thank you for your assistance in this matter.

Sincerely,



John H. Strom
Appellate Defender

JHS/smf

Enclosure

cc: J. Benjamin Aplin Jr., Esquire (w/enclosure)
Elizabeth Munnerlyn, Esquire *via email* (w/enclosure)
Phyllis Ann Lane (w/enclosure)