

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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AUG 01 2016

SC Court of Appeals

Appeal from York County
Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No. 2015-000611

THE STATE,

Respondent,

vs.

ORLANDO MARTINEZ COLEMAN,

Appellant.

MOTION TO STRIKE

Respondent (“the State”), through its undersigned counsel, would respectfully show unto the Court as follows:

I.

In October of 2013, Appellant Orlando Martinez Coleman was arrested after a young girl disclosed Appellant sexually abused her when she was six or seven years old. Subsequently, the York County Grand Jury indicted Appellant for two counts of first-degree criminal sexual conduct with a minor, and Appellant proceeded to trial on those charges in March of 2015. At the conclusion of trial, Appellant was convicted as indicted and sentenced to an aggregate twenty-five-year term of imprisonment. Appellant then timely appealed.

II.

On appeal, Appellant filed and served his Initial Brief of Appellant and Designation of Matter on March 11, 2016. In his Designation of the Matter, Appellant designated various

portions of the trial transcript, the indictments, and the amended indictments along with an arrest warrant and incident report related to his case. Appellant further directly cited to that matter, including the incident report, in his Initial Brief of Appellant.

III.

Pursuant to our appellate court rules, the Record on Appeal “shall include all matter designated to be included by any party under Rule 209” Rule 210(c), SCACR. Critically though, our appellate court rules further provides the Record on Appeal “shall not, however, include matter **which was not presented to the lower court or tribunal.**” *Id.* (emphasis added).

IV.

Amongst the matter identified in Appellant’s Designation of Matter, Appellant designated an incident report for inclusion in the Record on Appeal. However, no incident report was actually presented to the trial judge during Appellant’s trial, and no incident report appears to have ever been filed with the York County Clerk of Court.¹² Instead, the parties merely verbally referenced the contents of an incident report in their discussions with the trial judge about the issues raised in Appellant’s case.³ Accordingly, as no incident report was ever presented to the trial court, the incident report designated by Appellant cannot properly be

¹ The portion of the transcript reflecting the exhibits introduced during Appellant’s trial has been included with this motion as Attachment “A.”

² Significantly, although also not actually presented to the trial judge during trial, Appellant’s arrest warrant can properly be included in the Record on Appeal due to the fact it was filed with the York County Clerk of Clerk and was, therefore, before the trial court. See *South Carolina Dep’t of Soc. Servs. v. Janice C.*, 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009) (“These documents were filed with the family court; therefore, they were part of the record.”).

³ Portions of the transcript containing references to the incident report have been included with this motion as Attachment “B.” 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.

included as a part of Record on Appeal pursuant to Rule 210(c), SCACR, and must be stricken from Appellant's Designation of Matter. 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 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.”); see generally Roche v. South Carolina Alcoholic Beverage Control Comm’n, 263 S.C. 451, 455, 211 S.E.2d 243, 244 (1975) (“[T]he purpose of appeal under our procedure is ‘to determine if the lower court did something that it should not have done, or omitted doing something it should have done.’ Accordingly, a trial judge will not be reversed for failing to act on a matter that was not submitted to him.” (citation omitted)).

V.

Based on the foregoing, the State respectfully asks this Court to strike the incident report from Appellant's Designation of Matter and direct Appellant to file the Record on Appeal without including the improperly-designated matter. Additionally, the State asks this Court to strike the portions of Appellant's Initial Brief of Appellant citing directly to the incident report that was not properly before the trial judge and require Appellant to omit the direct citations to

the improperly-designated matter in his Final Brief of Appellant. Furthermore, the State requests this Court to hold the filing and service of the Record on Appeal in abeyance until this motion has been ruled upon.

WHEREFORE, the State prays that this Court will strike the improper matter designated by Appellant in his Designation of Matter; strike the portions of Appellant's brief directly citing to the improperly-designated matter; require the service and filing of a Final Brief of Appellant omitting any direct citation to the improper matter; direct Appellant to file the Record on Appeal without including the improperly-designated matter; hold the 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

MARK R. FARTHING
Assistant Attorney General

By: 

Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

August 1, 2016

Handwritten signature or scribble.

Attachment "A"

E-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
S-1	Miranda	113	215
S-2	CD - statements	113	221
S-3	CD - forensic interview	248,300	318
C-1	CD	12	
C-2	Note from jury	370	
C-3	Note from jury	370	

Attachment "B"

1 by these amended indictments, so I'm going to ask the State
2 to put on the record the process through which the
3 indictment process has proceeded in this case, so as I can
4 take a look at the all surrounding circumstances including
5 pre-trial matters that have gone into the creation of the
6 indictments. So I'll ask the State to go over that with
7 me. Once the State's completed that, I'll be happy to hear
8 from the defense on this matter. Yes, ma'am?

9 MS. O'HAYON - Thank you, Your Honor. The case
10 came in originally as one charge, one warrant. In the
11 incident report it did allege two different incidents, a
12 staircase incident and a tennis court incident. While
13 discussing plea offers, I had offered to the defense that
14 if he pleads to the one charge, I will not indict the
15 second charge; I will not make him plead to a second
16 charge. It would just be the one charge and that's it, but
17 if he were to reject that offer, that I did intend to go to
18 trial on two counts, one for each, the staircase and for
19 the tennis court. When I had originally indicted the case,
20 I indicted it as two indictments. That was back in
21 December. The original indictments were both pretty much
22 essentially the same thing as the amended indictment except
23 that they started back in 2010, and I based the indictment
24 based on the one consistent thing that I knew, was that the
25 victim lived there during both incidents. At the time I

1 MS. O'HAYON - Correct.

2 THE COURT - Does the victim differentiate it as
3 to which occurred first?

4 MS. O'HAYON - Yes, Your Honor, the victim ---

5 THE COURT - Which occurred first?

6 MS. O'HAYON - The staircase incident.

7 THE COURT - And then the second incident was at a
8 tennis court.

9 MS. O'HAYON - Correct.

10 THE COURT - Okay. So numerically, I think -- you
11 had told me that the first incident would be covered by
12 3857 and that the second incident would be 3858.

13 MS. O'HAYON - Correct, Your Honor.

14 THE COURT - Okay. I'll hear from the defense
15 concerning this matter as far as the lead-up to the issues
16 of the indictments, what knowledge you may have and what,
17 if any, prejudice might exists to the defendant given the
18 status of the indictments.

19 MS. ANDERSON - Yes, Your Honor. May it please
20 the Court. Your Honor, to give the background somewhat
21 from the defense perspective, as the State wrestles, (sic)
22 there was originally one charge, one warrant. That warrant
23 on the top of the warrant stated an alleged incident date
24 of September 11, 2011 -- excuse me -- September 1st, 2011.
25 During the discovery, the incident report that I received,

1 it did allege two different incidents. Those indicated as
2 being during the summer of 2011, and that would've been the
3 sort of discovery back around the time of -- around the
4 case coming in in October or November of 2013. The State -
5 --

6 THE COURT - Now, given that incident report, is
7 that what's been referred to as the staircase incident?

8 MS. ANDERSON - Yes, Your Honor, and the incident
9 report did mention one alleged location date of staircase
10 and one as tennis courts.

11 THE COURT - And the first one in the summer of
12 2011 would've been the staircase incident?

13 MS. ANDERSON - Both are alleged to have taken
14 place during the summer of 2011 in the ---

15 THE COURT - In the incident report.

16 MS. ANDERSON - In the -- I was also provided a
17 copy of the forensic interview, which the date of that
18 interview was September 24th, 2013. In the interview
19 there's an allegation of two different incidents made by
20 the child with the first date being alleged on a stairs and
21 a second being alleged on a tennis court with no discussion
22 of time range, date, year, month, day of the week, anything
23 of that nature. Over the course of this case I was made
24 aware that the State alleged the two different incidents,
25 would particularly look at the two different indictments,

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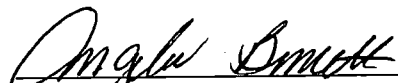
PROOF OF SERVICE

I, Angela S. Bennett, certify that I have served the within Motion to Strike on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jessica L. Birt, Esquire
Dixon Law Firm
105 Wappoo Creek Drive, Suite 3-B
Charleston, SC 29412

Robert M. Dudek, Esq.
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 1st day of August, 2016.



ANGELA S. BENNETT
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ALAN WILSON
ATTORNEY GENERAL

August 1, 2016

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SC Court of Appeals

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

RE: State v. Orlando Martinez Coleman – Appellate Case No. 2015-000611

Dear Ms. Kitchings:

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

Sincerely,

Mark R. Farthing
Assistant Attorney General
S.C. Bar Number 76901

MRF/
Enclosures

cc: Jessica L. Birt, Esquire
Robert M. Dudek, Esquire
Victim Services