

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from York County
Honorable Daniel D. Hall, Circuit Court Judge

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MAR 03 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DEAN GUISSPEPI DISTASIO,

APPELLANT

APPELLATE CASE NO. 2015-002130

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Defense counsel presented sufficient evidence that the recording of Appellant's 911 call provided by the solicitor was incomplete and that additional records were obtainable in one of two North Carolina counties with a brief continuance. Respondent's speculation regarding post-trial attempts to obtain additional evidence are not part of the record and, therefore, improper.

This case involves the trial court's erroneous denial of Appellant Distasio's motion for continuance, and related motion for mistrial, where the state failed to disclose the complete recording of Distasio's 911 call made during the alleged incident. As discussed more fully in Appellant's brief, the solicitor's initial discovery response to defense counsel included (1) a copy of the Computer-Aided Dispatch (CAD) report, reflecting 911 calls made received from witness Heather Cain at 11:25 a.m. and from Dean Distasio at 11:28 a.m., and (2) the recording of Cain's 911 call. R. 17, ll. 4-17. Based on the CAD report, defense counsel followed up with the solicitor and requested the recording of Distasio's 911 call. R. 19, ll. 17-23. The solicitor was initially informed by Ralph Merchant, the York County 911 operations manager, that no recording of a call from Distasio existed. R. 17, ll. 14-17.

Defense counsel was persistent. Upon further review of the records, a partial recording of Distasio's 911 call was located and disclosed to defense counsel two days prior to Distasio's trial. According to the solicitor, Merchant explained the delay in locating the recording in an e-mail: **"It [Distasio's 911 call] was a transfer from another county** so it wasn't on the 911 system. It was just like a regular phone call, which we get hundreds of a day. I'm sorry, but it can be looking for a needle in a haystack sometimes." R. 17, l. 21 – 18, l. 3. Thus, the solicitor was aware that the call was transferred from another county.

Though defense counsel was not privy to that e-mail from Merchant prior to making his motion for continuance, based on the content of the partial 911 call, counsel realized that the

recording provided was incomplete.¹ Accordingly, defense counsel requested a continuance to locate and obtain a copy of the first part of Distasio's call. R. 13, l. 5 – 14, l. 13. The trial judge preliminarily denied the motion for continuance but provided an opportunity for defense counsel to speak directly to Ralph Merchant during a recess. R. 22, l. 14 – 23, l. 12; R. 27, ll. 6-16. Defense counsel later renewed his motion for continuance, stating:

Judge, just to protect the record, I know we had some discussions in chambers about it, but I do again renew my motion for a continuance. I was given a 911 tape yesterday of my client. It first came into possession of the State yesterday -- or, actually, it was Monday. They gave it to me Monday. **We've had some telephone calls with the 911 dispatchers who are over the recordings and know what they're doing and it's my understanding that there is a very high likelihood a portion of that audio recording is housed, kept by somebody at Mecklenburg County or Gastonia County in North Carolina.** So we would move for a continuance on that ground.

R. 31, l. 23 – 32, l. 10 (emphasis added). Neither the solicitor nor the trial judge disputed counsel's recitation of their chamber's discussion. However, the trial judge denied the motion, citing his consideration of "all the circumstances and extensive conversation with counsel in chambers." R. 32, l. 19 – 33, l. 3.

Respondent attempts to undermine the legitimacy of defense counsel's argument that a portion of the call was missing, referencing counsel's discussion of the information obtained from Merchant during the recess as what defense counsel was "*claiming*." Respondent's Brief, p. 8-9 (emphasis added). Respondent also writes: "Distasio, *without any offer of proof*, suggested a recording *might* exist from Gaston or Mecklenburg County that would disprove" the

¹ The portion of Distasio's 911 call that was provided, began with an unidentified third party, who said: "Hey, there. We've got a 911 call from up in York County. It's Charlotte Highway in between Montgomery and Bonum Road. It's a male saying his, uh, wife was beating him. . . . His wife was hitting him." The York County operator, Tripp, responded: "We've got a call in that area. We're getting units on the way out there." Distasio then began speaking, saying, "Sir. I'm outside now. She broke my glasses. Tore my shirt off me." He answered the operator's questions and said that his wife had hit him and "jumped on [his] back as [he] was trying to leave." Defendant's Ex. 4 (Distasio's 911 call) (on file with this Court).

assertions by the state's witnesses that Distasio was not on the phone during the altercation. Respondent's Brief, p. 9 (emphasis added). Finally, Respondent asserts that "there is no reason to believe Distasio would have found the evidence *he imagines existed* if he received a continuance." Respondent's Brief, p. 10 (emphasis added). Certainly, Respondent does not intend to suggest that, in this age of technology, Mecklenburg and Gaston counties lack the means to maintain data and recordings of all calls received for emergency services. See N.C.G.S.A. § 132-1.5 (specifying that information collected in the 911 database "is confidential and is not a public record"). Rather, Respondent must be asserting that defense counsel was misrepresenting the information obtained from Merchant.

However, prior to the recess, **the solicitor admitted that Merchant told him in an e-mail that Distasio's call was "a transfer from another county."** R. 17, l. 21 – 18, l. 3. Defense counsel made specific reference to the beginning of the disclosed portion of Distasio's 911 call, which made obvious that the call was a transfer from somewhere, though at that time counsel was without the means to know from where. R. 13, l. 5 – 14, l. 18; Defendant's Ex. 4 (Distasio's 911 call) (on file with this Court). It was the solicitor who put defense counsel in touch with Merchant, who was on the state's witness list, during a recess. There is no reason to question defense counsel's representation, as an officer of the court, of the information supplied by Merchant regarding the two possible North Carolina counties to which Distasio's call was originally routed. R. 18, ll. 15-21; R. 22, ll. 3-25; R. 26, ll. 6-9; R. 27, ll. 6-16; R. 31, l. 23 – 32, l. 10; see also Davis v. Davis, 372 S.C. 64, 87–88, 641 S.E.2d 446, 458 (Ct. App. 2006) ("An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review. However, it is sufficient if the party puts the grounds or arguments and the trial judge's ruling in the record at a later time during the trial."); City of


North Charleston v. Gilliam, 311 S.C. 252, 254, 428 S.E.2d 720, 721 (Ct. App. 1993) (rulings made by trial judge at sidebar conferences without presence of court reporter may still be preserved for appellate review if they are reiterated for the record when the case is called for trial or trial resumes). Thus, there can be no serious dispute that Distasio's call was indeed transferred to York County from either Mecklenburg or Gaston counties in North Carolina. Consequently, it is highly probable that a brief continuance would have yielded a recording of the first portion of Distasio's 911 call, or at the very least an official document evidencing the timing of his call.

Respondent argues that because defense counsel asked for ten days to make any post-trial motions and did not file one, he "*apparently* failed to locate the alleged recordings during this ten day period." Respondent's Brief, p. 7, 9 (emphasis added). There is no requirement that, post-trial and sentencing, defense counsel provide the trial court with the evidence which he was denied a continuance to obtain during trial. Respondent's assumption that defense counsel attempted to obtain the recording post-trial and failed is improperly speculative and goes outside the record. See, e.g., State v. Pee Dee News Co., 286 S.C. 562, 568, 336 S.E.2d 8, 11 (1985) (refusing to speculate on matters not apparent in the record); Kibler v. State, 267 S.C. 250, 256, 227 S.E.2d 199, 202 (1976) (noting the PCR court will not speculate concerning what might have occurred if counsel had conducted further investigation).

It is was the responsibility of the solicitor to make a diligent search for the complete recording of Distasio's 911 call and provide it to defense counsel, even if it hurt the state's case. The trial judge abused his discretion in denying the defense's motions where the solicitor failed to provide the complete recording of Distasio's 911 call and then exploited the defense's inability to refute the false testimony elicited by the state.

CONCLUSION

For the reasons set forth herein and in the Brief of Appellant, Appellant Dean Distasio respectfully requests this Court reverse his convictions and grant him a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of March, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 3, 2017



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