

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Appeal from Greenville County
Honorable James R. Barber, III, Circuit Court Judge
Appellate Case No. 2016-001302

APR 20 2017

SC Court of Appeals

THE STATE,

Respondent,

vs.

JAMES DAMON LANAR WHITE,

Appellant.

**MOTION TO STRIKE
AND REQUIRE FILING OF
AMENDED INITIAL BRIEF OF APPELLANT**

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

Procedural History

Appellant was indicted during the June 2014 term of the Grand Jury for Greenville County for armed robbery, two counts of kidnapping, and conspiracy (2014-GS-23-03815). Appellant proceeded to a trial by jury from June 6-9, 2016, in Greenville, South Carolina. At the conclusion of trial, Appellant was found guilty as indicted. He was sentenced by the Honorable James R. Barber, III, to concurrent terms of twelve years for armed robbery, twelve years for each count of kidnapping, five years for conspiracy.

Prior to trial, Appellant made a pre-trial motion to suppress evidence found on two cell phones in Appellant’s possession. Judge Barber held a hearing on the motion to suppress on

April 11, 2016 in Greenville, South Carolina. At the hearing, Judge Barber heard testimony from Sergeant Thomas Motes, Investigator Matthew Owens, and Sergeant David Weiner, all of whom are employed with the Greenville County Sheriff's Department. See Attachment A. On June 6, 2016, Judge Barber issued a written order finding Appellant consented to allow investigators to search the two phones in his possession and that the consent was knowingly, intelligently, and voluntarily made. In his Order, Judge Barber noted in footnote 2, "Although [Appellant's] counsel thoroughly examined the testimony of the State's witnesses, [Appellant] neither testified nor introduced any evidence during the hearing." See Attachment B.

Motion to Strike Factual Assertions from Initial Brief of Appellant

In all cases, the trial judge is tasked with settling the lower court record. See *China v. Parrott*, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968) ("The issues on appeal must therefore be determined on the basis of the record as settled by the trial court."). Once a case has been appealed from the trial court, the Record on Appeal can only contain matter presented to the trial judge. See Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal."). Significantly, "the appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR.

In the current case, Issue I of the Initial Brief of Appellant is littered with references to facts not in the record. The argument in Appellant's brief is predicated on facts regarding Appellant's mental state throughout his interview with law enforcement when he consented to the search of the cell phones, which is not in the record. Specifically, Appellant's brief states, "Once Appellant realized that this pretense was part of a grander plan, he felt refusing consent to search would be futile. He believed that if police had the authority to trick and lure him to the LEC, then police must have authority to search his phones whether or not he gave consent."

Initial Brief of Appellant p. 8. Appellant argues, “Furthermore, the investigators made Appellant feel entrapped and vulnerable, and thus he did not feel that he was free to leave or deny consent to search the phone.” Initial Brief of Appellant p. 8. Appellant also contends:

Coupled with all these factors, Appellant felt he was at the complete mercy of police and consequently, consented to a polygraph exam. This feeling intensified when his nerves from the encounter thus far caused him to fail. Ultimately, the accumulation of the ruse, the confrontation about DUS, and the polygraph exam rendered Appellant to reasonably feel that he did not have the right to refuse consent. Therefore, Appellant did not give voluntary consent to search the cell phones.

Initial Brief of Appellant p. 8. None of the above facts appear anywhere in the record.

Significantly, Appellant’s brief provides no transcript citations to the above facts, despite providing citations to facts actually in the record throughout the rest of his brief.

Because Appellant presented no testimony regarding his thoughts and mental state during his interview with law enforcement, the factual assertions made in Appellant’s initial brief are not contained in the trial court record as they were not presented to the trial judge during the suppression hearing, nor did Appellant testify at trial and present that testimony to the jury. Therefore, those assertions cannot appropriately be embodied in Appellant’s initial brief pursuant to our appellate court rules. See Williamsburg Rural Water & Sewer Co., Inc. v. Williamsburg County Water & Sewer Auth., 367 S.C. 566, 571, 627 S.E.2d 690, 693 (2006) (“Nothing in the appellate court rules permits a party to unilaterally add after-created evidence to the record.”); South Carolina State Highway Dep’t v. Meredith, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) (“[C]ounsel is prohibited from embodying in their briefs any fact which does not appear in the record.”); see also Rule 210(h), SCACR (“[T]he appellate court **will not consider any fact** which does not appear in the Record on Appeal.” (emphasis added)). Accordingly, the State asks this Court to strike the factual assertions included in the Initial Brief of Appellant that do not


appear in the record of the trial court proceedings and to require the filing of an Amended Initial Brief of Appellant omitting reference to any facts not appearing in the trial court record. See Morris v. Tidewater Land & Timber, Inc., 388 S.C. 317, 333, n. 16, 696 S.E.2d 599, 608 (Ct. App. 2010) (“Under our appellate court rules, we may not consider any fact that does not appear in the record.”).

WHEREFORE, Respondent prays that this Court will strike the Initial Brief of Appellant because it contains factual assertions not appearing in the record of the trial court proceedings; require the filing of an Amended Initial Brief of Appellant containing no reference to the unsupported factual assertions; hold this appeal in abeyance pending a ruling on Respondent’s motion; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

By: 
V. Henry Gunter, Jr.

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

April 20, 2014

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EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
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S-43	Statement of James White	18	19
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C-1	Search Warrant	55
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(All exhibits were returned to law enforcement at the conclusion of the hearing.)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
State of South Carolina,)
)
vs.)
)
James Damon Lanar White,)
)
Defendant.)

IN THE COURT OF GENERAL SESSIONS

2014 GS-23-3815

2014A2330200739, -41 thru -44

ORDER

FILED
GREENVILLE COUNTY, SC
PAUL B. WILKINS, CLERK
2016 JUN - 11 AM 11:20

This matter came before the Court on April 11, 2016 on the Defendant's Motion to Suppress Evidence in the form of two cellphones and their contents. At the hearing the State presented evidence as to the following:

1. On January 20, 2014, an armed man robbed the Olive Garden restaurant near Cherrydale and controlled, at gunpoint, the movement of the three employees. The on-scene investigation led officers to believe the robber was assisted by one of those employees.
2. On January 22, 2014, Greenville County Sheriff's Office (GCSO) Inv. Ricky Motes arranged for Defendant, one of these employees, to come to his office for an interview.
3. Prior to Defendant's arrival, GCSO Sgt. David Weiner pulled Defendant's DMV records to obtain his photograph in preparation for the interview. The records indicated Defendant's driver's license was suspended.
4. Once Defendant arrived, Inv. Motes began to speak with him about the incident and to explain the interview process.
5. At some point, Sgt. Weiner asked Defendant how he arrived at the interview. When Defendant said he was dropped off, Sgt. Weiner told him there were video cameras in the parking lot. Defendant then admitted he had driven to the interview. Sgt. Weiner testified he asked Defendant these questions to determine whether Defendant would be truthful regarding the robbery.
6. Instead of allowing Inv. Motes to type his statement, Defendant insisted he write his own. At some point, Inv. Motes asked if the Kyocera cellphone (DW-1) Defendant was holding was his and if he could look through it. Defendant acknowledged the phone was his and agreed to allow Inv. Motes to search it.
7. Sgt. Weiner prepared a written consent form for Defendant's phone. Sometime later, Investigator Motes asked Defendant if he had anything else on him, and Defendant produced a second cellphone (DW-2: Samsung) from his pocket.

Defendant claimed the phone, but said he had not used this phone in months. Inv. Motes asked to look through this phone as well, Defendant agreed and handed him the phone. Inv. Motes then added the second phone to the consent form Defendant signed.¹

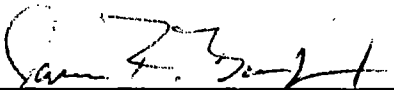
8. Sgt. Weiner then instructed Inv. Matt Owens to obtain a search warrant for the second phone due to concern that its addition to the consent form, in different ink, might raise concerns as to when this information was added.
9. Once the search warrant was executed, Inv. Owens reviewed the phone analysis report and, through additional investigation, determined that the Samsung phone belonged to co-defendant Gerald Gadsden.

THE COURT FINDS that the Defendant orally consented to allow investigators to search both the Kyocera and Samsung phones and that this consent was knowingly, intelligently and voluntarily made.² The Defendant's signature on the written consent form is further evidence of his intent to allow investigators access to the phones and their content.

THE COURT FURTHER FINDS, as to the second phone (DW-2: Samsung), the investigators were entitled to rely on the Defendant's assertion that the phone belonged to him and that he had the authority to consent to its search and were acting with reasonableness and in good faith in relying on those assertions.³

THEREFORE, the Defendant's Motion to Suppress evidence obtained from the search of the Kyocera (DW-1) and Samsung (DW-2) phones at trial is denied.

IT IS SO ORDERED.



The Honorable James R. Barber, III.
Presiding Judge
Thirteenth Judicial Circuit

June 6, 2016
Greenville, South Carolina

¹ Neither Investigator Motes nor Sergeant Weiner were able to recall whether Defendant signed the written consent before or after the addition of the second cellphone, though Weiner testified the Defendant's signature appeared to be in the same ink as the pen used by Motes to add the information on the second phone. Whether the consent was signed before or after the addition of the second phone does not bear on the Court's determination as to whether the Defendant consented to the search of these phones.

² Although Defendant's counsel thoroughly examined the testimony of the State's witnesses, Defendant neither testified nor introduced any evidence during the hearing.

³ Based on the Court's ruling, the Court does not find it necessary to determine the validity of the search warrant obtained for the Samsung phone by Investigator Owens.

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JAMES DAMON LANAR WHITE,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Motion to Strike and Require Filing of Amended Initial Brief of Appellant on Appellant by depositing one copy of the same in the United States mail, postage prepaid, addressed to his attorney of record William G. Yarborough, III, Esquire, 522 North Church Street, Greenville, South Carolina 29601.

I further certify that all parties required by Rule to be served have been served.

This 20th day of April, 2017.



Anne A. Mueller
Legal Assistant
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APR 20 2017
SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

April 20, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29201

Re: The State v. James Damon Lanar White
Appellate Case No: 2016-001302

Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of the Motion to Strike and Require Filing of Amended Initial Brief of Appellant, including proof of service, in the above-referenced case.

Sincerely,

V. Henry Gunter, Jr.
Assistant Attorney General
S.C. Bar No: 102259

VHG/aam
Enclosures

cc: William G. Yarborough, III (with one copy)
Ms. Trisha Allen