

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Maite Murphy, Circuit Court Judge
Appellate Case No. 2016-001977

RECEIVED

MAY 02 2017

SC Court of Appeals

THE STATE,

Respondent,

vs.

BREANNA FLANNERY,

Appellant.

**MOTION TO STRIKE APPELLANT'S
INITIAL BRIEF AND DESIGNATION
OF MATTER FOR
FAILURE TO COMPLY WITH
RULES 208, 209, & 210(c), SCACR,
AND MOTION TO HOLD TIMELINES
IN ABEYANCE**

Respondent now moves for this Court to strike Appellant's designation of matter and initial brief.

I.

Appellant's initial brief is devoid of any citations to the record save the rare reference to the magistrate's return. Accordingly, the brief fails to follow the requirements of Rule 208(b)(4), SCACR (concerning the contents of an initial brief and stating: "the brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in

the Record on Appeal. . . . In the initial briefs, these references should be to the page and line number of the transcript prepared by the court reporter . . .”); State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007) (excluding post-trial “Morris” letter not presented to the circuit court, and citing Rule 208(b)(4) and Rule 210(c), noting “a brief must reference the Record on Appeal to support the facts alleged.”).

Due to Appellant’s failure to follow this rule, it is extremely difficult, if not impossible, for the Respondent to determine if the facts alleged by Appellant are actually supported by the record. Respondent moves for this Court to strike Appellant’s brief and require Appellant to follow Rule 208 and provide references to the matters Appellant relies on to support the assertions in the brief.

II.

Appellant’s Designation of Matter lacks specificity. Appellant designates “ Defendant’s exhibits” without any further detail. It is unclear what exhibits he is designating as Appellant did not include a transcript of the magistrate’s proceeding in the record and the magistrate’s return fails to itemize the exhibits attached to the return. Based on records received from the Clerk of Court’s office, only two defense exhibits appear to have been attached to the magistrate’s return, Defendant’s Exhibits Nos. 9 and 10. Appellant also designates the magistrate’s return and “included documents.” Given the lack of itemization by the magistrate, it would be beneficial for Appellant to itemize the items he believes were attached to the return. Respondent moves for this Court to strike Appellant’s Designation of Matter and require Appellant to itemize in detail the exhibits and documents attached to the magistrate’s return.

III.

As previously mentioned, the brief is devoid of citation to the record making verifying of

the facts asserted in Appellant's initial brief difficult. However, numerous assertions in Appellant's brief seem to be based on opposing counsel's recollection of the trial rather than the magistrate's return, or a transcript or recording of the trial. For instance:

- (1) Appellant claims the officer making the initial traffic stop "was not trained in DUI detection." Br. of App. p. 3. Additionally, Appellant provides extensive detail on the stop itself beyond what is found in the Magistrate's Return and Appellant did not designate the stop video. Br. of App. p. 3. This includes the length of time Deputy Hayes followed Appellant, the distance, and other vehicles apparently seen in the video recording that was not designated by Appellant.
- (2) Appellant claims "[T]he only witness capable of identifying the video evidence or authenticating it as an official copy was Deputy Hayes." This fact is not found in the magistrate's return. Br. of App. p. 4.
- (3) Appellant also claims that during trial, "[T]he court ruled that the State got close enough and entered the video into evidence without any foundation at all." Br. of App. p. 4. This appears to be counsel's recollection and without a transcript, it is difficult to determine to what extent Appellant is paraphrasing the magistrate's ruling.
- (4) Appellant, apparently based on opposing counsel's recollection, claimed that before making a ruling on authentication of evidence, the magistrate took a recess. Br. of App. p. 4. Appellant then later claims, "The fact that a recess was taken, with the Judge returning and ruling that an unorthodox but sufficient foundation had been laid sheds light on the stretch the court had decided to make." Br. of App. p. 5. These facts are not found in the record, and without a transcript, it is unclear to what extent the

magistrate's ruling might have been paraphrased. Again, this seems to be opposing counsel's personal recollection of the trial.

- (5) Concerning the video of the stop, Appellant claims the return fails to mention that Deputy Hayes did not identify the video admitted into evidence and Appellant also claims the State failed to present chain of custody evidence. However, these are not findings made in the magistrate's return and the transcript of trial was not made part of the record in circuit court or now on appeal. Br. of App. pp. 6-7.
- (6) While the magistrate's return reflects that Appellant's motion in limine concerning testimony that Deputy Hayes was "flagged down" by someone providing a report of an impaired driver, Appellant's initial brief goes further, and seems based on personal recollection, and not any item in the record, when the following is claimed: "The Judge agreed and took time to explain to both officers that no mention could be made regarding Deputy Hayes being flagged down. All parties agreed and stated that they understood and the jury was called in to begin opening statements." Br. of App. p. 10. Appellant continues to claim: (1) the deputy referenced the tip in opening argument and defense counsel objected, (2) the jury was removed and the magistrate cautioned Deputy Tuck, (3) Deputy Tuck asked Deputy Hayes the reason he was following Appellant's car and counsel objected, with an ensuing side bar, (4) that Deputy Tuck was cautioned during the sidebar, (5) that Deputy Hayes responded to the follow up question by referencing the tip. Br. of App. pp. 10-11. All this appears to be outside the record.
- (7) Appellant claims Appellant was followed by Deputy Hayes for over eight minutes

before she was stopped. Br. of App. p. 12. Appellant makes specific reference to opposing counsel's cross-examination not found in the magistrate's return. Br. of App. p. 13.

(8) Appellant makes reference to a series of events concerning when jurors were supposed to report to court, that some reported late, that selection began in the late morning, that defense counsel at some point requested adjournment, that the judge allegedly said the trial needed to finish that day because he only sits on the bench on Mondays, that defense counsel allegedly objected, and that the trial court asked the jury at 8pm if they wished to continue or be dismissed for the day. Br. of App. p. 16. None of this detail is present in the magistrate's return and seems based on opposing counsel's personal recollection.

(9) Perhaps trivial, although described by Appellant in a scathing manner in her brief, is the claim, "[B]ecause of the trial judge's part-time status, the farce carried on late into the evening, asking a panel of 6 female jurors to enjoy their delivery pizza and deliberate in earnest, after an 11 hour Monday in the Summerville Magistrate Courthouse." Br. of App. pp. 18-19.

This is not intended to be an exhaustive list of items that appear to not appear in the record, since an exact accounting is difficult due to Appellant's failure to make proper references to the record as required under Rule 208. However, Respondent requests that this Court strike these references outside the record and any additional claims not supported by the record.

Further note, based on the records attained by Respondent, it does not appear that a transcript or audio recording of the trial was submitted to the circuit court. See Rule 210(c),

SCACR: “The Record shall not, however, include matter which was not presented to the lower court or tribunal.” Further, the transcript or audio recording of the trial was not included in Appellant’s designation of matter.

Quite simply, Appellant is impermissibly attempting to put facts before this Court that he failed to make available to the circuit court. I’On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (“Imposing preservation requirements on the appellant is meant to enable the lower court to rule properly after it has considered all relevant **facts**, law, and arguments” (emphasis added)). Since the brief appears to contain matter outside the record, Respondent requests this Court to strike Appellant’s initial brief and require an amended brief in compliance with Rule 210(c), SCACR.

IV.

Respondent also moves to hold all time-lines in abeyance until this Court rules on the State’s motion.

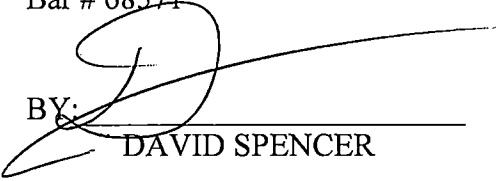
V.

WHEREFORE, Respondent prays that this Court strikes Appellant’s Initial Brief and Designation of Matter, and requires Appellant to submit an amended Initial Brief and Designation of Matter in compliance with Rules 208, 209, and 210, SCACR, and further requests that all filing deadlines be held in abeyance pending resolution of this motion; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
Bar # 68571

BY: 

DAVID SPENCER

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

ATTORNEYS FOR RESPONDENT

May 2, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Dorchester County
The Honorable Maite Murphy, Circuit Court Judge

Appellate Case No: 2016-001977

RECEIVED

MAY 02 2017

SC Court of Appeals

THE STATE,

Respondent,

v.

BREANNA FLANNERY,

Appellant.

PROOF OF SERVICE

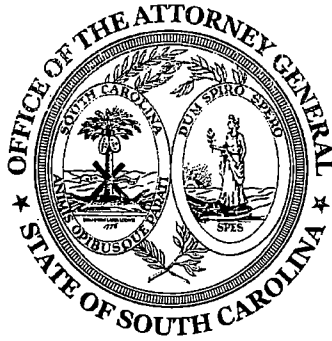
I, Anne Mueller, certify that I have served the Motion to Strike Appellant's Initial Brief and Designation of Matter and Motion to Hold Timelines in Abeyance on Appellant by depositing one copy of the same in the United States mail, postage prepaid, addressed to his attorney of record Timothy D. Amey, Esquire, 1495 Remount Road, N. Charleston, South Carolina 29406.

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

This 2nd day of May, 2017.



Anne A. Mueller
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

May 2, 2017

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

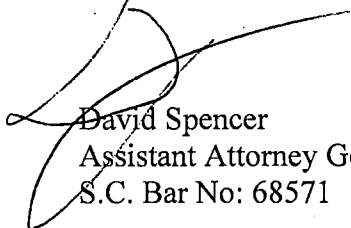
RECEIVED
MAY 02 2017
SC Court of Appeals

Re: The State v. Breanna Flannery
Appellate Case No: 2016-001977

Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of the Motion to Strike Appellant's Initial Brief and Designation of Matter for Failure to Comply with Rules 208, 209, & 21(c) SCACR, and Motion to Hold Time Limits in Abeyance, including proof of service, in the above-referenced case.

Sincerely,


David Spencer
Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

cc: Timothy D. Amey (with one copy)
Ms. Trisha Allen