

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

RECEIVED

MAY 05 2017

SC Court of Appeals

Magistrate Court Uniform Traffic Ticket No. 4102P0310884
Intermediate Appellate Case No. 2016-CP-18-0490
Appellate Case No. 2016-001116

THE STATE,

RESPONDENT,

v.

FLOYD RILEY,

APPELLANT.

**RETURN IN OPPOSITION TO APPELLANT'S MOTION TO
ADD TO THE DESIGNATION OF MATTER**

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

I.

On December 12, 2015, Appellant was arrested for speeding in Dorchester County for going 80 miles per hour (mph) in a 55 mph zone. (Uniform Traffic Ticket No. 4102P0310884). The arresting officer requested a bail amount of four hundred and forty-five dollars (\$445). On March 4, 2016, Appellant's case was called for trial before the Honorable Jackie G. Jenkins, Dorchester County Magistrate Judge, and a jury. Appellant was present and proceeded to trial which ended with the six person jury returning a unanimous guilty verdict. Appellant was

sentenced to pay a fine of four hundred and forty-five dollars (\$445). On March 11, 2016, Appellant timely appealed his conviction to the Dorchester County Court of Common Pleas, alleging errors by the trial court. On March 24, 2016, pursuant to Section 18-3-40 of the South Carolina Code, Judge Jenkins filed a “Transmittal of Traffic Appeal” wherein she made findings of fact and conclusions of law. (Transmittal of Traffic Appeal filed March 24, 2016, with the Dorchester County Clerk of Court).

On April 19, 2016, an appellate hearing was convened at the Dorchester County Courthouse before the Honorable Maite Murphy. Appellant appeared *pro se* and the State was represented by former Assistant Solicitor Kyle Leo Ward of the First Judicial Circuit Solicitor’s Office. In a Form 4 Order dated May 3, 2016, and filed May 13, 2016, the circuit court affirmed Appellant’s magistrate court conviction. (Order of Judge Murphy dated May 3, 2016).

II.

Appellant submitted a notice of intent to appeal the circuit court order affirming his conviction and sentence, which he served on Mr. Ward by mail on May 24, 2016. Appellant subsequently made a motion to order transcripts outside of deadline, which was served on Mr. Ward by mail on June 13, 2016. In an order filed June 21, 2016, this Court granted Appellant’s motion and directed that he inform the Court and the respondent when the transcript had been delivered. On August 16, 2016, Appellant filed an Initial Brief and on the same date served Mr. Ward with that Brief by mail.

III.

On October 18, 2016, the State submitted a “Motion to Dismiss Appeal for Failure to Correct Deficiency or, Alternatively, to Reset Time Limits from Proper Service of Appellant’s Designation of Matter.” This motion was based in part upon the fact that, when originally filed,

Appellant's initial brief was not accompanied by a designation of matter to be included in the record on appeal. Although Appellant apparently subsequently filed a designation of matter as directed by the Court in a deficiency letter, his attached "Certificate of Service" indicated it was served on the Honorable Diane S. Goodstein and Magalie Arcure Creech, Esquire, of the Finkel Law Firm, but not on either the Attorney General's Office or Mr. Ward. Based on this failure to timely and proper serve his designation of matter, the State moved to dismiss the appeal.

On October 24, 2016, Appellant submitted a reply to the motion to dismiss as well as a "Motion to Deny Respondent's Request for Additional time to file Initial Brief, and Designation of Matter." By Order filed December 8, 2016, this Court denied the State's motion to dismiss, denied Appellant's motion to deny additional time for the State to file its initial brief, and ordered the State to serve and file its initial brief within thirty (30) days of the order. On February 10, 2017, the State timely served and filed its "Initial Brief of Respondent" and "Designation of Matter."

IV.

On April 7, 2017, Appellant served and filed a "Motion for Late Filing of the Record on Appeal. On April 17, 2017, within "ten day from the date of service" of Appellant's motion, the State timely served and filed a "Return in Opposition to Motion for Late Filing of the Record on Appeal." See Rule 240(e), SCARC ("Any party opposing a motion or petition shall have ten (10) days from the date of service thereof to file an original and six (6) copies of his return with the clerk and serve on all parties a copy of the return."). In an order issued the same date, April 17, 2017, which appears to have been issued prior to receipt of the State's return, this Court granted Appellant's request for an extension to serve the record on appeal and file a proof of service, and extended the deadline for serving and filing the record until May 15, 2017.

V.

Appellant has served and file a “Motion to Add to the Designation of Matter” asking this Court to grant permission for him to add items to his designation of matter for inclusion in the record on appeal which he failed to timely designate pursuant to Rule 209, SCACR. That motion is the subject of the return in opposition now being served and filed on behalf of the State.

VI.

In his motion, Appellant asks this Court to allow him to “add the transcript of the magistrate Court jury trial” to his designation of matter. However, this is not permitted because this additional written material was not a part of the “papers” constituting the record before the circuit court. In regard to appeals from magistrates in criminal cases, the South Carolina Code provides: “The appeal must be heard by the Court of Common Pleas upon the grounds of exception made and upon the papers required under this chapter, without examination of witnesses in that court. And the court may either confirm the sentence appealed from, reverse or modify it, or grant a new trial, as to the court may seem meet and comformable to law.” S.C. Code Ann. § 18-3-70 (Supp. 2016) (emphasis added). In describing the “papers required under this chapter” the Code provides: “Within ten days after service the magistrate shall file the notice in the office of the clerk of circuit court, together with the record, a statement of all the proceedings in the case, and the testimony taken at the trial as provided in Section 22-3-790.” S.C. Code Ann. § 18-3-40 (Supp. 2016). Section 22-3-790 contemplates that testimony be taken down in writing and signed by the witness, or that it be taken down by a stenographer or electronically recorded; however, it does not provide for transcription of electronically recorded testimony. S.C. Code Ann. § 22-3-790 (Supp. 2016). Thus, Appellant may not add a transcript of the magistrate court proceedings to the record he now wishes to submit to this Court, because that transcript was not properly before the circuit

court. Rule 210(c), SCACR (“The Record shall not, however, include matter which was not presented to the lower court or tribunal.”).

VII.

In his motion, Appellant asks this Court to allow him to add to his designation of matter because he “feels that this transcript is needed to show the error of the court of common pleas.” In other words, the only grounds upon which Appellant now seeks permission for late amendment of his designation of matter is so he can bootstrap inclusion of this item in the record on appeal where it was NOT designated for inclusion by either party. Appellant’s October 24, 2016, designation of matter makes no mention whatsoever of an audio recording or a transcript of an audio recording from his trial before the magistrate. Likewise, the State’s February 10, 2017, designation of matter also does NOT designate these items. Indeed, the State’s initial brief was written with the understanding, created solely by Appellant when he served his original designation of matter, that Appellant intentionally chose NOT to designate these items and instead was electing to rely solely upon the magistrate’s written return and the proceedings before the circuit court.

The South Carolina Appellate Court Rules provide in part that: “At the same time a party serves his initial brief(s) under Rule 208, to include a reply brief, he shall also serve on all parties to the appeal a Designation of Matter to be Included in the Record on Appeal which shall set forth with specificity those parts of the transcript, pleadings, orders, exhibits, or other materials which he proposes to include in the record on appeal.” Rule 209(a), SCACR (emphasis added).

Appellant’s initial brief was dated and filed on August 16, 2016. The Rules go on to provide that: “The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. Rule 210(c), SCACR. Appellant was already given more time to serve and file the record on appeal. He should not also be allowed to


now alter or add to his designation of matter in an effort to justify his desire to include matters beyond those designated by the parties prior to filing of initial briefs. Indeed, inclusion of additional matters which have neither been provided to nor reviewed by the State would be prejudicial and would likely require the State to materially alter or amend several of the arguments in its initial brief. Appellant had every opportunity to designate all qualifying materials he wished to designate for inclusion in the record on appeal many months ago; however, he has waited until AFTER the State filed its initial brief to decide he now wants additional items to be included in the record on appeal. The State respectfully asks this Court to deny his request and to order timely filing of the record on appeal on or before May 15, 2017, to include ONLY those matters properly designated by the parties.

WHEREFORE, the State respectfully requests that this Court deny Appellant's motion to add to the designation of matter.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

BY: 
J. Benjamin Aplin
S.C. Bar #8729

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

ATTORNEYS FOR RESPONDENT

May 5, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

RECEIVED

Maite Murphy, Circuit Court Judge

MAY 05 2017

SC Court of Appeals

Magistrate Court Uniform Traffic Ticket No. 4102P0310884
Intermediate Appellate Case No. 2016-CP-18-0490
Appellate Case No. 2016-001116

THE STATE,

RESPONDENT,

v.

FLOYD RILEY,

APPELLANT.

PROOF OF SERVICE

I, Angela S. Bennett, certify that I have served the within "Return in Opposition to Motion to Add to the Designation of Matter" by depositing two copies of the same in the United States mail, postage prepaid, addressed to Floyd Riley, 341 Hudson Road, Saint George, SC 29477.

I further certify that all parties required by Rule to be served have been served. This 5th day of May, 2017.



ANGELA S. BENNETT
Legal Assistant

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



ALAN WILSON
ATTORNEY GENERAL

May 5, 2017

RECEIVED

MAY 05 2017

SC Court of Appeals

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

RE: State v. Floyd Riley
Appellate Case No. 2016-001116

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the "Return in Opposition to Motion to Add to the Designation of Matter" along with proof of service, for filing in the above-referenced appeal.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Floyd Riley
Kyle Leo Ward, Esquire
Victim Services