

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

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 TO APPELLANT'S MOTION TO DISMISS

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 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

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fine of four hundred 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 the 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 properly 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 days 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.

On April 28, 2017, Appellant served and filed 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. On May 5, 2017, the State submitted a return in opposition to the motion asking this Court to “deny [Appellant’s] 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.” It does not appear that the Court has yet ruled upon Appellant’s motion to add to his designation of matter; however, he has now served and filed a Record on Appeal which, according to a “corrected” certificate of service, was clocked in by the Court on May 22, 2017. The certificate of service indicates the record on appeal was served by mail on May 13, 2017; yet it was not received by the State until May 22, 2017.

VI.

Along with the record on appeal, Appellant has also now served and filed a “Motion to Dismiss” asking this Court to dismiss the State’s case because the Dorchester County Magistrate Court is unable to provide him with an audio recording of his trial. As with the record on appeal, this motion to dismiss was first received by the State via U.S. mail on May 22, 2017, even though the “corrected” certificate of service indicates it was purportedly served by mail on the State on May 13, 2017. Appellant’s motion to dismiss is the subject of the return now being served and filed on behalf of the State.

VII.

In his motion, Appellant asks this Court to “dismiss the State’s case” based on a May 1, 2017 letter from Carolyn Roberts, the court clerk of the Magistrate Court for Dorchester County,

explaining her office cannot provide him with a copy of the trial transcript from March 4, 2016. He complains the magistrate court, being fully aware that the trial was under appeal, nevertheless recorded over or destroyed the audio recording which it now is unable to provide. Appellant argues the recording is vital for him to prove to this Court that the magistrate court erred, and that the court of common pleas erred in upholding the magistrate's ruling. He argues he has a right to submit all relevant documents that pertain to his case to show error by the court of common pleas, and that not having the recording available places "high prejudice" on his ability to show error. Based on these difficulties, Appellant asks this Court to dismiss the State's case.

VIII.

To the extent Appellant is asking this Court to dismiss his appeal because he believes he is unable to provide a sufficient record for review, the State does not object to dismissal of the appeal on this basis. *See State v. Williams*, 321 S.C. 455, 464 n.4, 469 S.E.2d 49, 55 n.4 (1996) (noting the burden is on appellant to provide a sufficient record for review); *see also Wilson v. American Casualty Co.*, 252 S.C. 393, 397, 166 S.E.2d 797, 798 (1969) ("The burden is on an appellant to present sufficient record from which this Court can determine whether the lower court erred in the respects charged; and where, as here, the exceptions require consideration of the trial evidence, which is not included in the record, such exceptions will not be considered."). Appellant appears to acknowledge that he is unable to provide a sufficient record for review. As such, his appeal should simply be dismissed.

To the extent Appellant is asking this Court to dispense with further appellate review and summarily reverse his conviction based on the absence of the audio recording of his trial, the State respectfully submits such action is not warranted. The "Transmittal of Traffic Appeal" filed by Magistrate Judge Jenkins on March 24, 2016, pursuant to Section 18-3-40 of the South Carolina

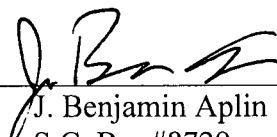
Code, included a procedural history making findings of fact and conclusions of law. (Transmittal of Traffic Appeal filed March 24, 2016, with the Dorchester County Clerk of Court). If this Court determines appellate review is warranted despite the lack of an audio recording or transcript from Appellant's trial, the document submitted by Judge Jenkins provides adequate information to review the Appellant's claims, or lack thereof.

WHEREFORE, the State respectfully requests that this Court grant Appellant's motion to dismiss to the extent he wishes to abandon his appeal. Alternatively the State respectfully requests that this Court deny the motion to dismiss and proceed on the initial briefs, original designations of matter, and record on appeal that have now been submitted.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

BY: 

J. Benjamin Aplin
S.C. Bar #8729

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ATTORNEYS FOR RESPONDENT

May 26, 2017

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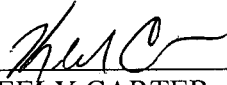
FLOYD RILEY,

APPELLANT.

PROOF OF SERVICE

I, Keely Carter, certify that I have served the within "Return to Motion to Dismiss" 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 26th day of May, 2017.



KEELY CARTER
Legal Assistant

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Columbia, SC 29211
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ALAN WILSON
ATTORNEY GENERAL

May 26, 2017

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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 to Motion to Dismiss" 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