

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2018-000161

RECEIVED

JAN 03 2019

SC Court of Appeals

THE STATE,

Respondent,

vs.

ORIN JERRELL KEMP,

Appellant.

MOTION TO STRIKE

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

I.

On January 24, 2018, Appellant Orin Jerrell Kemp appeared in the Pickens County Court of General Sessions and entered guilty pleas to charges of petit larceny, breaking into a motor vehicle, possession of burglary tools, and financial transaction card theft before the Honorable Edward W. Miller, circuit court judge. At the conclusion of the plea proceedings, the circuit court judge accepted Appellant’s guilty plea, sentenced him to an aggregate term of imprisonment of ten year, and suspended the sentence upon the service of a five-year term of incarceration followed by a three-year term of probation. Furthermore, the circuit court judge indicated orally and on the applicable sentencing sheet Appellant was to receive credit for time served pursuant to Section 24-13-40 of the South Carolina Code of Laws as calculated and

applied by the South Carolina Department of Corrections. Subsequently, Appellant appealed his sentence through the filing of a timely notice of appeal despite the fact no objections were raised by Appellant on any grounds at any point during the plea proceedings.¹

II.

On December 7, 2018, Appellant filed an Initial Brief of Appellant and Designation of Matter. Through his Designation of Matter, Appellant designated various matter to be included in the Record on Appeal, including an “Email from Christine Bigelow to Christopher Brumback.” Furthermore, Appellant cited to and referenced the contents of an email purportedly sent by Deputy General Counsel Christina Bigelow at the South Carolina Department of Corrections to Appellant’s plea counsel at various points in his appellate brief.

III.

While preparing the Initial Brief on Respondent in Appellant’s case, undersigned counsel discovered Appellant’s designation of the above-referenced email and contacted Appellant’s appellate counsel to obtain a copy of that matter. In response, Appellant’s counsel provided undersigned counsel with a copy of the email, which appears to contain communications between Deputy General Counsel Bigelow and Appellant’s plea counsel from the dates of February 22, 2018, and April 3, 2018. As those communications took place several weeks *after* the January 2018 plea proceedings in which Appellant was convicted and sentenced, neither the

¹Notably, because Appellant did not raise any objections during the plea proceedings, Appellant did not properly preserve *any* issues for appellate review, including any issues he may have had with his sentence. See In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) (“Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review.”); see also State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) (“[A] challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.”); cf. State v. Walker, 252 S.C. 325, 327-328, 166 S.E.2d 209, 210 (1969) (declining to address Walker’s appellate contention the sentence he received could not have properly been imposed “on the elementary ground that the question was not raised below”).

designated email nor any of the information contained within it appears to have been presented to or considered by the circuit court judge in Appellant's case.

IV.

Pursuant to Rule 210(c) of the South Carolina Appellate Court Rules, the Record on Appeal "shall include all matter designated to be included by any party under Rule 209[.]" Critically, Rule 210(c) further provides the Record on Appeal "shall not . . . include matter *which was not presented to the lower court or tribunal.*" Id. (emphasis added). Based on that rule, only matter before the circuit court can be included in the Record on Appeal, and parties are precluded from including matter that does not satisfy that fundamental requirement in the appellate record and briefs. See State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) ("Morris' statement was not presented to the lower court and cannot properly be included in the Record on Appeal."); see also 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."). Moreover, an appellate court will *not* consider any matter not properly included in the Record on Appeal when reviewing a case on appeal. See Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal."); see also 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.").

IV.

In the case sub judice, Appellant designated an email for inclusion in the Record on Appeal that was neither before the circuit court judge nor even in existence at the time of the plea

proceedings from which Appellant has filed his appeal. Because the email was not presented to the circuit court judge and, thus, was obviously not considered or relied upon by the circuit court judge during the plea proceedings, it cannot properly or permissibly be included as a part of Record on Appeal pursuant to the clear, unambiguous mandates of our appellate court rules. See White, 372 S.C. at 387, 642 S.E.2d at 619 (recognizing matter not presented to the circuit court judge simply cannot appropriately be included in the Record on Appeal); see also Roche v. South Carolina Alcoholic Beverage Control Comm'n, 263 S.C. 451, 455, 211 S.E.2d 243, 244 (1975) (“[T]he purpose of appeal under our procedure is ‘to determine if the lower court did something that it should not have done, or omitted doing something it should have done.’ Accordingly, a trial judge will not be reversed for failing to act on a matter that was not submitted to him.” (citation omitted)). Furthermore, Appellant directly cited to and referenced the improperly-designated matter in his Initial Brief of Appellant even though that matter was never actually presented to the circuit court judge. Again, pursuant to requirements of our appellate court rules, that improperly-designated matter cannot properly be embodied in the appellate briefs just as it cannot appropriately be included in the Record on Appeal. See 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 Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) (“[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review.”). Moreover, this Court cannot properly consider the improperly-designated matter or the impermissible references to it contained in Appellant’s appellate brief in resolving Appellant’s case on appeal. Cf. Tant v.

Guess, 37 S.C. 489, 512-513, 16 S.E. 472, 480 (1892) (“[I]f the purpose was to ask this court to consider facts not presented to the Circuit Court, . . . then it is clear beyond dispute that we cannot consider such facts. For, as is said by Taney, C. J., in *Russell v. Southard*, 12 How., at page 159: ‘According to the practice of the Court of Chancery from its earliest history to the present time, *no paper not before the court below can be read on the hearing of an appeal.*’ This court has, in numerous cases, recognized and affirmed this doctrine.” (emphasis added)).

V.

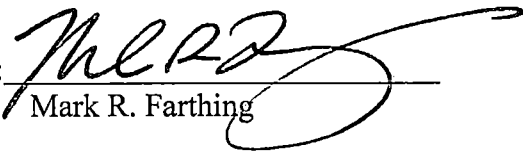
Based on the foregoing, the State respectfully asks this Court to strike the “Email from Christine Bigelow to Christopher Brumback” from Appellant’s Designation of Matter. Likewise, the State asks this Court to strike the portions of Appellant’s Initial Brief of Appellant citing to and referencing the improperly-designated matter and to require Appellant to serve and file an Amended Initial Brief of Appellant containing no reference to that particular matter. Furthermore, the State requests this Court to hold the time period for the filing and service of the Initial Brief of Respondent and Designation of Matter in abeyance until this motion has been finally ruled upon.

WHEREFORE, the State prays this Court will strike the improper matter designated by Appellant in his Designation of Matter; strike Appellant’s appellate brief referencing the improperly-designated matter and require the service and filing of an Amended Initial Brief of Appellant omitting any reference to the improper matter; hold the time period for service and filing of the Initial Brief of Respondent and Designation of Matter in abeyance pending a ruling on this motion; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

By: 
Mark R. Farthing

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

January 3, 2019

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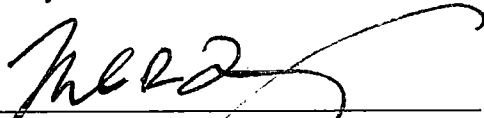
Appellant.

PROOF OF SERVICE

I, Mark R. Farthing, certify that I have served the within Motion to Strike on Appellant by sending two copies of the same to:

Victor R. Seeger, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 3rd day of January, 2019.



MARK R. FARTHING
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



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SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

January 3, 2019

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

RE: State v. Orin Jerell Kemp -- Appellate Case No. 2018-000161

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Motion to Strike, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Victor R. Seeger, Esquire
Victim Advocacy Division