

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Greenwood County  
The Honorable Frank R. Addy, Jr., Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**

JUN 26 2019

Respondent  
SC Court of Appeals

THE STATE,

vs.

Dazzelle Smith,

Appellant.

Appellate Case No. 2018-000952

\_\_\_\_\_  
**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. Appellant designated the transcript of a motion to suppress the seized narcotics that was held before the Honorable Donald B. Hocker. However, it does not appear that this transcript was ever presented to the Honorable Frank R. Addy, Jr., who was the judge presiding over the jury trial resulting in Appellant's convictions. Therefore, the transcript should be struck from the record as should references to the transcript found in Appellant's initial brief. Respondent also moves to hold the record in abeyance pending this Court's ruling on Respondent's motion. Transcript

pages cited are attached to the Respondent's motion.

I.

This case was brought to trial three times. The first time was before Judge Hocker, who granted a mistrial after a law enforcement officer made an inadvertent reference to Appellant's prior criminal record. April 9, 2018 transcript (Tr.) pp. 24-25; Br. of App. p. 6. A motion to suppress narcotics seized was held before Judge Hocker prior to the trial. The case was tried again before the Honorable Frank R. Addy, Jr., in January 2018. Judge Addy granted a mistrial after the jury was unable to reach a verdict. The case was tried the third time before Judge Addy in April 2018, and Appellant was found guilty. No in camera hearing for the motion to suppress was held before the third trial, but Judge Addy allowed Appellant's trial counsel to raise the suppression motion at the close of the State's case and Appellant relied on a memorandum provided to Judge Addy. Tr. pp. 22-23; pp. 132-33. However, the record fails to indicate that Appellant's trial counsel supplied a transcript of the suppression motion held before Judge Hocker or that Judge Addy had the transcript of the suppression motion in making his ruling on Appellant's argument that the drugs should be suppressed.

II.

The transcript from the motion to suppress before Judge Hocker should not be included in the record on appeal because it does not appear Judge Addy had the transcript to consider at the time he ruled on Appellant's motion to suppress. Under Rule 210(c), SCACR: "The Record shall not, however, include matter which was not presented to the lower court or tribunal." Further, Appellant is not allowed to put facts before this Court that he failed to make available to Judge Addy at trial. 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)). Therefore, Respondent requests this Court to strike Appellant's initial brief and require an amended brief in compliance with Rule 210(c), SCACR; 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).

III.

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

IV.

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:

  
\_\_\_\_\_  
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ATTORNEYS FOR RESPONDENT

June 26, 2019



1     whatever those instructions are. I am anticipating needing  
2     you back sometime later this week. Okay? You are excused.  
3     Thank you.

4             (Whereupon, the jury panel was released a 12:57 p.m.)

5             THE COURT: The jury is out. Did you have a matter for  
6     the Court before I release the jury?

7             MR. YARBOROUGH: I did, Your Honor. But if the Court  
8     please, we move to suppress the drugs that were found in the  
9     car. And I know this Court is familiar with the case, and  
10    I'd ask the Court to look at -- at his Fourth and Sixth  
11    Amendment violations that might have taken place. And I  
12    understand the Court will look at that and rule accordingly  
13    as the trial goes on.

14            THE COURT: All right. Just so that the record is  
15    clear, we did have a brief discussion and the intention is  
16    to handle it the same way that we did previously in January,  
17    and a motion has been made at the close of the State's case  
18    if insufficient evidence or testimony exists as it relates  
19    to those two issues, then the Court will act appropriately  
20    and you'll be protected for the record, Mr. Yarborough.

21            It's my intention to go ahead and release the jury and  
22    have them report back at 2:15 and then we'll get rolling in  
23    earnest on this. I don't genuinely believe that we're going  
24    to be able to finish this today, but let's at least get some  
25    testimony in. Okay? Let's have the jury, please.

1           (Whereupon, the jury entered the courtroom at 1:04  
2 p.m.)

3           THE COURT: Ladies and gentlemen, who were selected on  
4 this jury, we're going to go ahead and take a lunch break at  
5 this particular point in time. One common refrain that  
6 you'll hear me say each and every time that we take a break  
7 is don't discuss the case. Okay? So that certainly goes at  
8 this point in time. And that should be amazingly easy for  
9 you because you haven't heard the first witness. You know  
10 nothing about this case at this point in time, so it should  
11 be easy to not talk about it.

12           If you would, please be back in the jury room at 2:15.  
13 If during the course of the trial you want to take notes,  
14 just indicate to the Bailiff when you come back from lunch  
15 that you'd like a notepad. He'll provide you with a notepad  
16 and a pen or pencil, and I'll give you some further  
17 instructions on notes. So if you want to take notes, that's  
18 fine. You don't have to. But if you want to, just ask him  
19 for a tablet when you come back and we'll pass out tablets  
20 to everyone who would want one. Okay?

21           With that, enjoy your lunch. Be back here, if you  
22 could, right around 2:15, please, or as close thereto as you  
23 can make it. Thank you. You're excused. Wear those badges  
24 back. They'll help identify you as jurors.

25           (Whereupon, the jury was released for lunch at 1:06

1 p.m.)

2 THE COURT: We'll be at ease until 2:15. Mr. Smith,  
3 you know the routine. See you back at 2:15.

4 THE DEFENDANT: Yes, sir.

5 (Whereupon, a lunch recess was held from 1:06 p.m. to  
6 2:15 p.m.)

7 THE COURT: We'll go back on the record in the State  
8 vs. Mr. Smith. Anything before we begin with the Court's  
9 remarks, any arguments, Mr. Yarborough?

10 MR. YARBOROUGH: Just quickly, Your Honor. I know --  
11 this is just for the record. I'd like to -- and I don't  
12 know if there are any grounds for it. I'd like to make a  
13 motion that the State not be allowed to go forward and this  
14 case was once tried and was -- the end of the case was a  
15 mistrial because of the State had asked a question that came  
16 out about there -- I guess there being a prior record. And  
17 then -- and then we tried it last time to a hung jury in  
18 front of Your Honor, and it just seems like it's a violation  
19 of his constitutional rights to continue to have to show up  
20 here and meet the same charges over and over again.

21 THE COURT: I understand. I think in my prior -- I  
22 think a similar issue was raised in the previous trial and  
23 the Court made the determination that the mistrial wasn't --  
24 it wasn't a situation where the State had goaded the Defense  
25 into moving for a mistrial. The comment by the officer was

1 inadvertent. I believe that was the Court's ruling, or at  
2 least ill advised. And seeing as how we don't have a  
3 resolution of these issues yet, your motion is noted, but I  
4 would deny your motion.

5 MR. YARBOROUGH: Thank you, Your Honor.

6 THE COURT: That's my understanding of the law at  
7 least. Let's have the jury out, please.

8 (Whereupon, the jury entered the courtroom at 2:15  
9 p.m.)

10 THE COURT: We are back on the record. It looks like  
11 everyone is present. Ladies and gentlemen, thank you for  
12 being back and being back on time. The first order of  
13 business for the Court is to appointment a foreperson of the  
14 jury. Who's Ms. Johnson? Ms. Johnson? I'd like to make  
15 you the forelady, if I may. I'll tell you there's not a lot  
16 of responsibility with this. Okay? Your only -- your  
17 primary job would be to simply make sure that everybody has  
18 a chance to have their fair say once the case is submitted  
19 to you in the jury room. And then you would be the one to  
20 render a verdict or write the verdict on the actual  
21 indictment. So if it's okay, I'll make you the foreperson.  
22 All right? Good deal.

23 Ernestine is who I was talking about. Are you  
24 Ernestine?

25 THE JUROR: I am.

1 jury, at this point in time I'll need to ask that you  
2 adjourn to the back for just a few moments. I need to take  
3 up a few issues of law with the attorneys involved, and then  
4 I'll bring you back out and proceed with -- we'll proceed  
5 further. Please, again, don't discuss the case until I tell  
6 you to do so. Adjourn to the back. We'll have you back out  
7 here ASAP.

8 (Whereupon, the jury exited the courtroom at 9:25 a.m.)

9 THE COURT: All right. Mr. Yarborough, I assume that  
10 Mr. Smith moves for a directed verdict, correct?

11 MR. YARBOROUGH: Directed verdict. Yes, sir, Your  
12 Honor. And as part of that I'd also like to -- in the last  
13 trial I filed a motion with the Court to suppress the  
14 evidence and a memorandum that went along with it. I think  
15 it's still part of the file. And I think at this time there  
16 seems to be even less evidence of the officers having the  
17 ability to search the car in one area. And then as well in  
18 this case, that there was any dominion or control over that  
19 car by Mr. Smith except that he happened to be in it.

20 THE COURT: All right. As it relates to the search  
21 issue and all the other issues, the Court finds that there  
22 was sufficient reasonable articulable suspicion to warrant  
23 searching the car. There has been testimony that marijuana  
24 was observed in plain view. There has been testimony of the  
25 odor of marijuana coming from the car, and being a vehicle

1 we are dealing with exigent circumstances to a degree. So  
2 the Court's -- same ruling as in the prior trial. That will  
3 be the ruling as it relates to the search and as it relates  
4 to the Defendant's motion to suppress the drugs that were  
5 seized as a result of the search of the car. And as it  
6 relates to the directed verdict motion, the Court will  
7 respectfully decline to grant a directed verdict in this  
8 case. There is evidence viewed in a light most favorable to  
9 the State that the jury could reasonably conclude that the  
10 Defendant exercised dominion and control over the narcotics,  
11 possessed the narcotics. And, therefore, I'll decline to  
12 grant a directed verdict at this stage.

13 Are we still in the same position as we were in  
14 January? Does your client still intend to not testify or  
15 has he -- do you desire to testify, Mr. Smith, or are you  
16 going to assert your Fifth Amendment?

17 THE DEFENDANT: No, sir.

18 THE COURT: So you're going to assert your Fifth  
19 Amendment rights? All right. He nods yes. Very good.  
20 I'll give everybody about five minutes to take a comfort  
21 break. The jury instructions, if I'm not mistaken, are  
22 probably identical to what we did last time. My Clerk is  
23 nodding yes. We've printed those out. I assume you still  
24 have them. We'll take about five or 10 minutes and then go  
25 straight into it. Of course, Mr. Yarborough will get the

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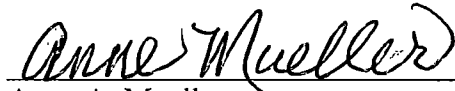
**PROOF OF SERVICE**

I, Anne Mueller, certify that I have served the within 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 on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorneys of record:

Lauren C. Hobbis, Esquire  
308 W. Stone Street  
Greenville, SC 29609

William G. Yarborough, III, Esquire  
308 W. Stone Street  
Greenville, SC 29609

I further certify that all parties required by Rule to be served have been served.  
This 26th day of June, 2019.

  
\_\_\_\_\_  
Anne A. Mueller  
Legal Assistant

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ALAN WILSON  
ATTORNEY GENERAL

June 26, 2019

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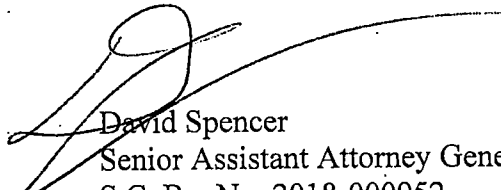
Lauren C. Hobbis, Esquire  
308 W. Stone Street  
Greenville, SC 29609

**RE: The State v. Dazzelle Demarcus Smith**  
**Appellate Case No: 2018-000952**

Dear Ms. Hobbis and Mr. Yarborough:

Enclosed please find 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 Timelines In Abeyance in the above-referenced case.

Sincerely,

  
David Spencer  
Senior Assistant Attorney General  
S.C. Bar No: 2018-000952

DS/aam  
Enclosures

cc: The Honorable Jenny A. Kitchings (with original and 6 copies)  
Victim Advocacy Division