

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeal from Greenwood County Court of General Sessions
The Honorable Frank R. Addy Jr., Circuit Court Judge

SEP 09 2019

SC Court of Appeals

Appellate Case No. 2018-000952

State of South Carolina..... Respondent,

v.

Dazzelle Smith..... Appellant.

**APPELLANT'S RESPONSE IN OPPOSITION TO
RESPONDENT'S MOTION TO STRIKE AND
MOTION TO HOLD TIMELINES IN ABEYANCE**

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ATTORNEYS FOR APPELLANT

The Appellant, Dazzelle Smith, by and through his undersigned attorneys, hereby respectfully submits this Response in Opposition to the Respondent's Motion to Strike and Motion to Hold Timelines in Abeyance. Appellant's Initial Brief and the materials listed in Appellant's Designation of Matter comply with the appellate court rules. Appellant should not be denied his right to appellate review on direct appeal of the suppression issue raised in Appellant's Initial Brief. Appellant thus respectfully urges this Honorable Court to deny the Respondent's Motions for the reasons provided herein.

Respondent's aims in seeking this Motion to Strike are rather properly suited for an issue preservation argument, which is not a basis for such a motion to strike. Respondent's request is not cognizable for this Court to grant. Additionally, Respondent cites *State v. White*, 372 S.C. 364, 642 S.E.2d 607 (Cl. App. 2007) in support of the Motion to Strike; *White* is entirely inapplicable to this case and to the Respondent's Motion. In *White*, this Court would not consider a letter submitted as newly discovered evidence because it was not presented to the lower court judge when he made his ruling on the defendant's motion as the letter was not submitted/filed with the lower court until after the notice of appeal was filed. Appellant's case and the reasons Respondent provides in support of the Motion to Strike completely differ from the issue and procedural posture in *White*. *White* also did not involve an issue ruled upon by the trial court in a pretrial hearing or involve subsequent multiple trials with different presiding judges.

Further, Appellant's Initial Brief and the materials listed in Appellant's Designation of Matter to be included in the Record on Appeal comply with the appellate court rules. Contrary to Respondent's interpretation of the applicable appellate court rules, this matter was indeed preserved for review by the filing of the transcript of the pre-trial hearing on the Motion to Suppress and the filing of the Record on Appeal. An evidentiary hearing on the Appellant's Motion to

Suppress was heard immediately prior to the first jury trial held before Judge Hocker and Judge Hocker denied the Motion to Suppress on record. It is abundantly clear from the record of the subsequent retrial that Judge Addy was familiar with Judge Hocker's ruling on the Motion to Suppress heard in the earlier trial; Judge Addy repeatedly on record discussed and made specific references to the proceedings in the earlier trial and Judge Hocker's ruling, stated that he agreed with Judge Hocker's ruling, and also repeatedly informed Appellant's Trial Counsel at the retrial that he need not object and that the suppression issue was indeed preserved for appellate review.

Further, Appellant could find no court rule or case that requires Respondent's interpretation of the applicable appellate court rules. Appellant could also find no court rule or case that requires the judge presiding over the very same case at a retrial to review the transcript of a pre-trial evidentiary hearing from the earlier trial or require the judge at the retrial to state that on record. In particular, Appellant could not find any court rule or case that requires Respondent's interpretation of the applicable appellate court rules that would apply to a situation such as here where the ruling at issue was made in a pre-trial evidentiary hearing and where the defendant was tried multiple times thereafter. Appellant rather found one case that is generally averse to Respondent's overall argument *Clements v. Young*, 310 S.C. 734, 25 S.E.2d 63, fn. 1 (1992) ("The only evidence of record regarding the existence of landmarks or monuments...is contained in the affidavit of a surveyor. The referee's reconstruction of the case makes no reference to testimony or evidence regarding natural landmarks or artificial monuments. The [] Appellate Court Rules require that '[t]he Record shall not include matter which was not presented to the lower court or tribunal'... Accordingly, we assume that the affidavits included in the record on appeal were before the referee even though he makes no mention of them.") (italics added). Thus, Appellant should not be denied the right to appellate review upon the suppression issue just because Judge Addy did not explicitly state on the record that he read the transcript from the first trial.

Denying Respondent's Motion to Strike is also appropriate because it is not as though the grounds for Appellant's Motion to Suppress or its underlying supporting facts changed between the pre-trial hearing or Appellant's retrial, which had there been such change, might have required Judge Ady to make an additional ruling or somehow affirm Judge Hocker's ruling. Upon being retained and trying the case, Attorney Yarborough filed a motion to suppress on the same grounds as that of the Motion heard in the earlier trial before Judge Hocker just out of procedural precaution to ensure issue preservation. This should not supplant the evidentiary hearing in the first trial or the ruling for the purposes of appellate review.

Therefore, Appellant should not be denied his right to appellate review on direct appeal of the suppression issue raised in Appellant's Initial Brief. In accordance with the foregoing, Appellant requests this Honorable Court to deny the Respondent's Motion to Strike and Motion to Hold in Abeyance and requests that Respondent be ordered to respond to all issues raised in Appellant's previously filed Initial Brief as they are presented.

Respectfully submitted,



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ATTORNEY OF RECORD FOR APPELLANT

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PROOF OF SERVICE

The undersigned hereby certifies that one (1) original of Appellant's Response to Respondent's Motion to Strike and Motion to Hold Timelines in Abeyance, and six (6) copies were filed with the Court this day through the United States mail with sufficient postage attached addressed to:


The Honorable Emily A. Smith Kitchens, Clerk of Court
South Carolina Court of Appeals
305 E. 12th St.
Columbia, South Carolina 29201

The undersigned further certifies that two (2) true copies of the Appellant's Response to Respondent's Motion to Strike and Motion to Hold Timelines in Abeyance were served upon the Respondent this day through the United States mail with sufficient postage attached addressed to:

Senior Assistant Deputy Attorney David Spencer
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

The undersigned further certifies that all parties required to be served pursuant to the appellate court rules have been served.

This 5th day of September 2019



Lauren C. Hobbis, SC Bar #103190
William G. Yarborough III, Attorney at Law, LLC