

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

DAZZELLE SMITH,

Appellant.

Appellate Case No. 2018-000952

REPLY TO APPELLANT'S RETURN TO
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

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Respondent now makes its reply to Appellant Smith's return to the State's motion to strike. Appellant designated the transcript of a motion to suppress the seized narcotics that was held before the Honorable Donald B. Hocker. However, Appellant fails to show that this transcript was ever presented to the Honorable Frank R. Addy, Jr., the judge presiding over the jury trial resulting in Appellant's convictions.

Concomitantly with this reply, the State is moving to vacate this Court's November 8, 2019

order denying the State's motion because Appellant's return to the State's motion was never received by this office.

In response to the State's motion, Smith claims the transcript should be included because Judge Addy knew a prior suppression motion occurred before Judge Hocker before Judge Hocker later granted a mistrial, and that the argument is an error preservation argument that should be reserved for briefing.

Of course, it is absurd to argue Judge Addy could have erred for failing to consider testimony never presented to him. Yet that is what Appellant attempts to do by inclusion of the mistrial transcript. Further, Smith's argument fails to recognize that the previous suppression hearing was rendered null by the granting of a mistrial. "Because a mistrial is the equivalent of no trial, the trial [court] could not rely on any evidentiary rulings from the nugatory proceeding." State v. Smith, 336 S.C. 39, 43-44, 518 S.E.2d 294, 296 (Ct. App. 1999). "A mistrial is the equivalent of no trial and leaves the cause pending in the [trial] court." State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009). The transcript needed to be presented to Judge Addy to be eligible as part of the record pursuant to Rule 210(C), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal."). Therefore, this is the appropriate time to rule on whether the transcript should be included in the record.

Further, Smith's attempt to distinguish State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007) fails because as in White, the matter Smith attempts to designate was not presented to Judge Addy prior to his ruling on Smith's motion.

While Judge Addy, in his discretion, arguably could have accepted the transcript in lieu of live testimony from the officers, Smith's trial counsel simply failed to present the transcript –

perhaps because of trial strategy – and relied solely on the evidence presented at trial to support his Fourth Amendment claim. See Rish v. Rish by and Through Barry, 296 S.C. 14, 17, 370 S.E.2d 102, 104 (Ct. App. 1988) (Bell, J., concurring) (The Court of Appeals does not sit to relieve self-inflicted wounds). It is very likely Smith’s counsel wanted Judge Addy to rule on the motion to suppress only on the evidence presented at trial which is limited only to evidence sufficiently salient for the jury’s consideration. “One may not preserve a vice until he learns what the result will be and then take advantage of the error on appeal.” State v. Penland, 275 S.C. 537, 273 S.E.2d 765, 766 (1981).

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 timelines in abeyance pending this Court’s ruling on Respondent’s motion and the corresponding motion to vacate the previous order.

II.

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

III.

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

November 15, 2019

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Reply To Appellant's Return To 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 one copy of the same in the United States mail, postage prepaid, addressed to each of his attorneys of record:

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

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

I further certify that all parties required by Rule to be served have been served.
This 15th day of November, 2019.



Anne A. Mueller
Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

November 15, 2019

William G. Yarborough, III, Esquire
308 W. Stone Avenue
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RE: The State v. Dazzelle Smith
Appellate Case No: 2018-000952

Dear Mr. Yarborough and Ms. Hobbis:

Enclosed please find two copies of the State's Reply To Appellant's Return To 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 in the above-referenced case.

Sincerely,

For David Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

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