THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2018-002056
Lower Case Nos. 2014-GS-22-00803 | 2014-GS-22-00804

The State, ...Respondent,

v.

Randy Collins,.....Appellant,

APPELLANT'S RETURN TO RESPONDENT'S MOTION TO ALLOW FILING OF SUPPLEMENTAL RECORD ON APPEAL

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Co-counsel for Appellant

Pursuant to Rules 212(b) and 240(e) of the South Carolina Appellate Court Rules, Appellant Randy Collins submits this Return to Respondent's Motion to Allow Filing of Supplemental Record on Appeal, dated February 25, 2020. In its motion, the State seeks to supplement the Record on Appeal to include Appellant's testimony in the jury trial of Marissa Cohen held from January 6, 2020 to January 9, 2020 before the Georgetown County Court of General Sessions with the Honorable Kristi F. Curtis presiding.

The State's motion to supplement the record should be denied. Appellant's trial testimony in a separate case should not be included in the record because it was not presented to the lower court in Appellant's case below. As a result, his subsequent testimony is not permitted to be included in the record under Rule 210(c), SCACR. Also, the decisions relied on by the State – *Whetsell v. State*, 276 S.C. 295, 277 S.E.2d 891 (1981), and *State v. Sroka*, 267 S.C. 664, 230 S.E.2d 816 (1976) – do not involve attempts to supplement the record with testimony from a separate trial and, therefore, do not support supplementation of the record.

Even if the record is supplemented, Appellant's testimony does not eliminate the prejudice he suffered as a result of the trial court's erroneous admission of his statements to law enforcement in the case on appeal. Appellant can demonstrate that he was prejudiced by the trial court's error because he would not have testified in Ms. Cohen's trial but for such error. As a result, Appellant's testimony in Ms. Cohen's trial will not affect the issues on appeal.

I. Supplementation of the record is improper because Rule 210(c) expressly bars from the record matters that were not presented to the lower court.

The State's motion to supplement the record is not proper under Rule 210(c), SCACR, which provides that "[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal." Because the trial testimony proffered by the State was given in a separate, subsequent trial and was not presented to the lower court in Appellant's case below, it

should not be included in the record under Rule 210(c). *See Pena v. State*, 932 S.W.2d 33 (Tex. Ct. App. 8th Dist. 1996) (denying motion to supplement record with statement from trial of co-defendant and ruling that it "is not proper for an appellate court to look to another appellate record to supply deficiency in proof of another case under consideration on appeal").

Although Rule 212(b) allows a party to supplement the record with leave of the Court, it does not permit a party to expand the record with materials that were not presented to the lower court. Also, the State does not support its motion with any authority permitting supplementation of the record with testimony from a separate case that was tried after a defendant's conviction.

The only two cases relied on by the State in its motion are *Whetsell* and *Sroka*. However, neither of those cases support the proposition that a record on appeal can be supplemented with materials from a separate case. Both *Whetsell* and *Sroka* involved inculpatory statements made by defendants during the post-conviction phases of their respective cases. They did not involve attempts to supplement the record on appeal with testimony from separate trials. As such, the admissions of guilt in *Whetsell* and *Sroka* were appropriately included in the records on appeal in those cases under Rule 210(c). Therefore, *Whetsell* and *Sroka* do not support supplementation of the record with materials that are expressly excluded from the record under Rule 210(c).

II. Appellant's subsequent testimony does not eliminate the prejudice caused by the lower court's admission of his statements to law enforcement.

Even if Appellant's trial testimony from Ms. Cohen's trial is included in the record, it would not eliminate the prejudice that Appellant suffered from the trial court's admission of his

statements to law enforcement in his case. And the State's reliance on *Whetsell* and *Sroka* to support its argument that Appellant's testimony eliminates any possible prejudice is mistaken.[1]

Neither *Whetsell* nor *Sroka* addresses the situation presented here, which involves a defendant, after his conviction, agreeing to testify in a separate trial of another defendant in return for the State's recommendation of a sentence reduction. In this case, the trial court's error in admitting Appellant's statements, which were the only evidence supporting his guilt, resulted in his conviction and a 30-year prison sentence. Faced with such a substantial sentence, Appellant agreed to testify in Ms. Cohen's trial to seek a downward departure. The lower court's erroneous admission of Appellant's statements directly resulted in the testimony that the State seeks to add to the record, which proves a direct, causal relationship between the statements and the prejudice resulting from the trial court's admission of the statements. Thus, Appellant's subsequent testimony in Ms. Cohen's trial does not eliminate the prejudicial effect of the trial court's error below. If anything, it underscores that prejudice.

Moreover, subsequent decisions from the South Carolina Supreme Court have limited the holding in *Whetsell*. *See Johnson v. Catoe*, 336 S.C. 354, 520 S.E.2d 617 (1999) (explaining that *Whetsell* stands for narrow proposition that a PCR applicant who has pleaded guilty cannot show prejudice if he states he would have pleaded guilty in any event); *Craddock v. State*, 327 S.C. 303, 491 S.E.2d 251 (1997) (distinguishing *Whetsell* on the ground that the defendant stated he would not have pleaded guilty but for counsel's error). As those cases demonstrate, *Whetsell* does not

[1] Appellant's testimony in Ms. Cohen's trial does not amount to an admission of committing first-degree arson. Although Appellant testified about his involvement in the plan to burn Ms. Cohen's home, he also testified that he did not see his cousin light the fire and that he does not believe that they started the fire that burned the home. (Supp. R. pp. 11-14, 19.) Therefore, Appellant's testimony does conclusively establish guilt as the defendant's admission did in *Sroka*.

stand for a blanket rule that any post-conviction statement of guilt by the defendant eliminates any possibility of prejudice from trial error.

In *Whetsell*, the defendants pleaded guilty to larceny on the advice of their counsel. More than a year later, the defendants filed petitions for post-conviction relief based on their attorney's failure to file a motion to suppress evidence. *Whetsell*, 276 S.C. at 297, 277 S.E. at 892. During their post-conviction hearing, the defendants reiterated their guilt and stated that they would plead guilty if granted a new trial. *Id.* Despite these statements, the trial court granted the petitions for post-conviction relief, which the Supreme Court reversed. *Id.* The Supreme Court, citing *Sroka*, ruled that review of trial error by the defendants' counsel was unnecessary because the respondents had admitted their guilt and stated that they would plead guilty again in a new trial. *Id.*

The Supreme Court revisited its holding in *Whetsell* several years later in *Johnson v. Catoe*, 336 S.C. 354, 520 S.E.2d 617 (1999). In that case, the court clarified that *Whetsell* does not stand for the proposition that a defendant who admits his guilt is barred from collaterally attacking his conviction. *Id.* at 358-59, 520 S.E.2d at 619. Instead, the court explained, "*Whetsell* stands only for the narrow proposition that a PCR applicant who has pled guilty on advice of counsel cannot satisfy the prejudice prong on collateral attack if he states he would have pled guilty in any event." *Id.* According to the court, the operative fact that led to its holding in *Whetsell* "is not the admission of guilt but the fact that the PCR applicants in that case stated they would plead guilty again if granted a new trial." *Id.* at 358, 520 S.E.2d at 619. As a result, the Supreme Court concluded that *Whetsell* does not bar a capital defendant who admits his guilt at sentencing from challenging guilt phase errors on collateral attack. *Id.* at 359, 520 S.E.2d at 619.

Johnson demonstrates that the narrow holding in *Whetsell* does not apply to this case. As the court explained in *Johnson*, *Whetsell* is a guilty plea case in which PCR was granted by the

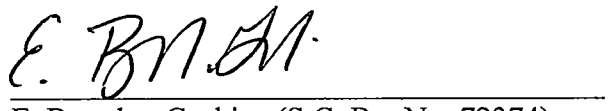
trial court but reversed on appeal based on the operative fact that the defendants admitted that they would plead guilty again if granted a new trial. Thus, the facts in *Whetsell* are far removed from those in this case.

Yet *Johnson* also makes clear that the determination of prejudice should be decided by the effect of the trial error on the defendant's admission of guilt. The court stated in *Johnson* that a defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty. *Id.* at 358, 520 S.E.2d at 619.

Applying the court's reasoning in *Johnson* to the present case demonstrates that Appellant's testimony in Ms. Cohen's trial does not eliminate prejudice from the trial court's error. Appellant can show that there is a reasonable probability that but for the trial court's errors in his case and his resulting conviction, he would not have testified in Ms. Cohen's case. So just as a defendant who admits his guilt at sentencing is not barred from challenging guilt phase errors on collateral attack, a defendant should not be barred from directly challenging his conviction because he provides testimony in a separate trial of another defendant in an attempt to reduce his sentence. Therefore, Appellant should not be barred from directly challenging the errors made by the lower court in his case merely because he provided assistance to the State in Ms. Cohen's trial.

CONCLUSION

Based on the arguments above, Appellant requests that the Court deny the State's motion to supplement the record on appeal.



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Co-counsel for Appellant

March 6, 2020
Charleston, SC

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Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2018-002056
Lower Case Nos. 2014-GS-22-00803 | 2014-GS-22-00804

The State,..... Respondent,

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PROOF OF SERVICE

This is to certify that I have this day served counsel for the Respondent in the foregoing matter with a copy of the foregoing **APPELLANT'S RETURN TO RESPONDENT'S MOTION TO ALLOW FILING OF SUPPLEMENTAL RECORD ON APPEAL** by depositing the same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

Alan Wilson, Attorney General
Scott Matthews, Assistant Attorney General
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March 6, 2020

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: ***The State v. Randy Collins***
Appellate Case No.: 2018-002056
Lower Court Case No.: 2014-GS-22-00803; 2014-GS-22-00804
MVA File No.: NB7900.16

Dear Ms. Kitchings:

With regard to the above referenced action, enclosed for filing please find the original and seven (7) copies of **Appellant's Return to Respondent's Motion to Allow Filing of Supplemental Record on Appeal** with Proof of Service.

Please file the original and return a clocked-in copy to me in the enclosed self-addressed, stamped envelope.

By copy of this letter, I am serving a copy of the foregoing upon counsel for the Respondent.

Thank you for your assistance in this matter and please call me with any questions.

Sincerely,

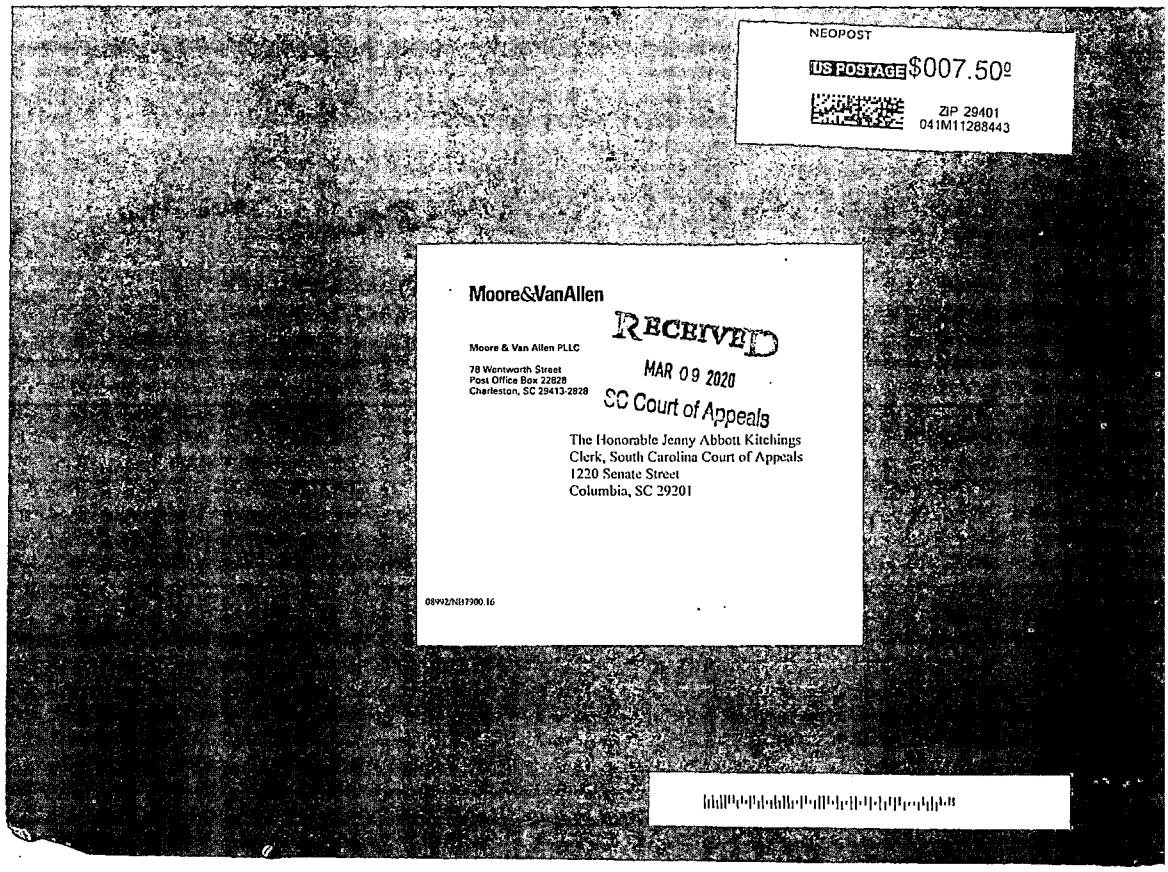
Moore & Van Allen PLLC

E. Brandon Gaskins

EBG/llp

Enclosures: as stated

cc: Alan M. Wilson, Esquire/ Scott Matthews, Esquire
Jimmy A. Richardson, Esquire
Robert M. Dudek, Esquire



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