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Nov 24 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Maite Murphy, Circuit Court Judge

THE STATE,

Respondent,

V.

JAMES WINSTON ALMOND,

Appellant.

APPELLATE CASE NO. 2020-001397

MOTION TO STRIKE

Counsel for Appellant, James Almond, moves to strike a portion of two sentences and footnote 2 from the State's Initial Brief of Respondent. The undersigned makes this motion in accordance with Rule 240, SCACR.

This case involves the question of whether the trial court properly admitted Appellant's prior convictions pursuant to Rule 609, SCRE, and State v. Colf, 337 S.C. 511, 525 S.E.2d 246 (2000). See Initial Brief of Appellant at 1. A contested issue is whether the State offered proof that Appellant's armed robbery conviction was within the ten-year time frame set forth in Rule 609(b). See Initial Brief of Appellant at 11-13. Counsel for Respondent filed the Initial Brief of Respondent on November 17, 2021. In its initial brief, the State has argued that Appellant's 2007 conviction for armed robbery was within the ten-year time frame of Rule 609(b), SCRE, and was

therefore properly admitted. In support of this argument, Respondent uses information that is outside of the record and that was not before the trial court.

There are three specific instances of Respondent using information outside of the record in support of its argument. Respondent first makes a claim that is not supported by the record by stating that Appellant “was released from confinement in 2017, making this conviction fall within the ten year time limit.” IBOR, pg. 7. Respondent next states “[t]his would place Appellant’s release from confinement in 2017, therefore within the ten year time limit.” IBOR, pg. 9. Finally, Respondent includes footnote 2 which states “Appellant was released to community supervision on December 31, 2015.” IBOR, pg. 9.

Nowhere in the two hundred-sixty-two-page trial transcript is the year 2017, or the date, December 31, 2015, mentioned. In fact, at trial the solicitor merely speculated that the armed robbery conviction was within the ten-year time frame by arguing that the conviction was from 2007, so Appellant “would have just gotten off of any kind of supervision within the last, you know, five years or so of that.” Tr. 156, ll. 12-16. However, the solicitor did not offer a certified copy of the conviction date nor did he offer records from the department of corrections to support his assertion.

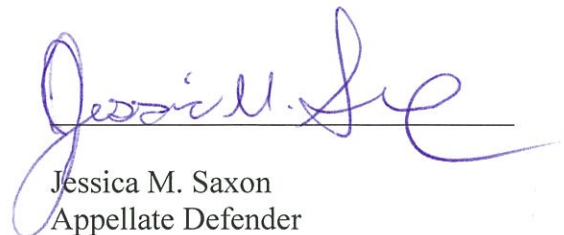
Additionally, Respondent provided no citation for the dates that Appellant was purportedly released from custody. It appears that Respondent is relying on the fact that Appellant was given a ten-year sentence in 2007 to calculate Appellant’s release date. However, such a calculation fails to consider any potential pre-sentencing credit that Appellant might have been given which would impact any potential parole eligibility date or release date. The information asserted by Respondent is not legal research nor is it information generally known that is not subject to dispute and capable of being judicially noticed. Rule 201(b), SCRE. Finally, Appellant cannot respond

to these assertions without also relying on information that is outside of the record and that was not before the trial court.

The trial court did not have this date-specific information before it when it admitted the prior conviction, and therefore the information cannot be considered on appeal in support of the admission of the prior conviction. See Rule 208(b), SCACR (defining the contents of the brief and limiting facts to those that can be referenced in the record); Rule 210(c), SCACR (stating “[t]he Record **shall not include matter which was not presented to the lower court** or tribunal) (emphasis added) ; Rule 210(h), SCACR (limiting the appellate court’s review to only those facts which appear in the Record on Appeal); Rule 208(b)(2) (stating that the respondent may ask the Court to affirm on any ground **appearing on the record**)(emphasis added).

For these reasons, Appellant respectfully requests that this Court order that any reference to 2017, or December 31, 2015, be stricken from the Initial Brief of Respondent and require an Amended Initial Brief of Respondent to be served, with those date assertions, which are outside of the record, removed. Appellant further requests that this Court hold in abeyance the deadline for filing the initial reply brief until such time as a ruling on the Motion to Strike is issued because counsel for Appellant must first know if she will need to respond to the assertions referenced above before she can finalize the reply brief.

Respectfully submitted,



Jessica M. Saxon
Appellate Defender

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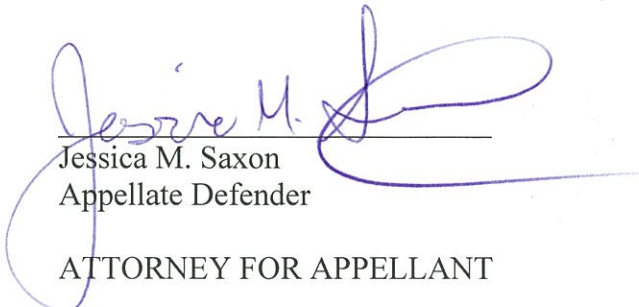
JAMES WINSTON ALMOND,

APPELLANT.

APPELLATE CASE NO. 2020-001397

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Motion to Strike in the above referenced case have been served upon Ambree M. Muller, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on James Winston Almond, #323232, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 24th day of November, 2021.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT