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

REPLY TO RESPONDENT'S RETURN TO APPELLANT'S MOTION TO STRIKE AND MOTION TO AMEND DESIGNATION OF MATTER

Respondent has asked this Court to deny Appellant's motion to strike and to allow Respondent to amend the designation of matter to include evidentiary documentation that was not before the trial court. Appellant vehemently opposes the motion to amend the designation of matter, as the amendment would be in violation of Rule 209 and Rule 210, SCACR. Appellant respectfully requests that this Court deny the motion to amend the designation of matter and grant the motion to strike the information that was not before the trial court from the Initial Brief of Respondent.

I. Motion to Strike

Respondent's argument in support of inserting facts into the record that were never presented to the trial court is wholly untenable. Respondent submits that the State is "merely

seeking to eliminate the speculation" from the record. Return to Motion, pg. 2. However, the speculative information upon which the trial court improperly relied was caused by the solicitor's failure to provide the trial court with the evidentiary proof required to admit a prior conviction pursuant to Rule 609, SCRE. Respectfully, the State cannot now backdoor fix on appeal what it failed to prove at trial.

Respondent has also asserted that Appellant had some duty at trial to correct the solicitor's speculation as to his release date. However, it is well-settled that the burden of establishing the admissibility of a prior conviction of the defendant is upon the State as the proponent of the evidence. State v. Robinson, 426 S.C. 579, 595, 828 S.E.2d 203, 211 (2019). See Also State v. Johnson, 363 S.C. 53, 59, 609 S.E.2d 520, 523 (2005) citing State v. Colf, 337 S.C. 622, 626, 525 S.E.2d 246, 248 (2000) (stating Rule 609(b) creates a presumption that remote convictions are inadmissible and places the burden on the State to overcome this presumption). Under Rule 609(b) the State, not the defendant, is required to prove the timeliness of the conviction *at trial* in order to admit the conviction for impeachment purposes.

Respondent further claimed that Appellant has moved to strike facts that "were relied upon at trial." Return to Motion to Strike, pg. 2. This is a misstatement of the record. At no point did the solicitor provide the trial court with any proof of a release date. As reflected in the trial transcript, the solicitor only speculated as to Appellant's release from confinement on the armed robbery conviction. See R. 156, ll. 12-16. Appellant seeks only to contain the information in Respondent's brief to those facts that were before the trial court. Any other information the State may have, including the information it currently seeks to add to the record, cannot be considered on appeal, as it was not considered by the trial court.

Appellant is contending that the trial court erred in admitting his prior convictions. Part of that error was allowing the State to introduce the armed robbery conviction without providing proof that it was within the ten-year time frame. While the State may now have documentation to support its position, the critical question on appeal is whether the trial court had enough proof to support the admission of the convictions. The record shows that the State did not offer into evidence any certified records from SCDC, nor did it offer certified proof of Appellant's convictions. The fact that the trial court admitted the convictions without any proof is part of the error alleged on appeal. The trial court did not have specific release date information regarding Appellant's prior convictions, and therefore this Court should order the references to the date-specific information detailed in Appellant's Motion to Strike stricken from Respondent's Initial Brief.

II. Motion to Amend Designation is Improper and Should be Denied

Pursuant to the South Carolina Appellate Court Rules, "the Record on Appeal, and the Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be *properly* included in the Record on Appeal." Rule, 209(b) (emphasis added). The Appellate Court Rules clearly and unambiguously state that "[the Record *shall not*, however, *include matter which was not presented to the lower court* or tribunal." Rule 210(c) (emphasis added). See Also Spreeuw v. Barker, 385 S.C. 45, 68, 682 S.E.2d 843, 854 (Ct. App. 2009) (concluding this Court could not review Father's expenses and income because the challenged evidence did not appear in the record and therefore could not be considered on appeal).

The rules that limit the record to evidence and facts that were before the trial court are in place because "the transcript of record is the source of our information as to what occurred in the trial of the case below; *its very object is to inform the Court authoritatively of the legal questions*

contested below and of the facts pertaining thereto. S.C. State Highway Dep't v. Meredith, 241 S.C. 306, 311, 128 S.E.2d 179, 181 (1962) citing Sawyer, Wallace & Co. v. Macaulay, 18 S.C. 543 (1883) (emphasis added).

The transcript from Appellant's trial is devoid of any reference to the specific information that Respondent now seeks to include on appeal. The trial court did not consider the date-specific information at the time it admitted the convictions, and therefore the information is irrelevant to the matter before this Court. Including such documentation in the record would be improper and in violation of Rule 209 and 210, SCACR. The failure of the solicitor to meet his burden of proof at trial cannot now be cured by Respondent adding evidence to the record on appeal.

III. Judicial Notice of a Disputed Fact is Improper

Respondent has requested that this Court take judicial notice of a fact that was not before the trial court. However, "[f]or a fact to be subject to judicial notice, it must be so notorious that the court *may properly assume its existence without proof.*" Masters v. Rodgers Development Group, 283 S.C. 251, 255, 321 S.E.2d 194, 196 (Ct. App. 1984) (emphasis added). Stated differently, "[j]udicial notice *takes the place of proof.*" Id. (emphasis added). Additionally, "[a]ppellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable." Id. at 197, 321 S.E.2d at 256. This is because "[n]otice of facts for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principal that appellate review should be limited to the record." Accordingly, this Court has held that "original judicial notice of adjudicative facts at the appellate level *should be limited to matters which are indisputable.*" Id. (emphasis added).

The date of Appellant's release from confinement on the armed robbery conviction is not so notorious that it can be known without proof. Consequently, the date specific information

cannot be subject to judicial notice. Moreover, whether Appellant's conviction for armed robbery was within the ten-year time frame set forth in Rule 609(b), SCRE, is a disputed fact, precisely because the information was not provided to the trial court. The propriety of admitting Appellant's prior convictions must be determined by examining only what the trial court considered and nothing else.

IV. Issue on Appeal

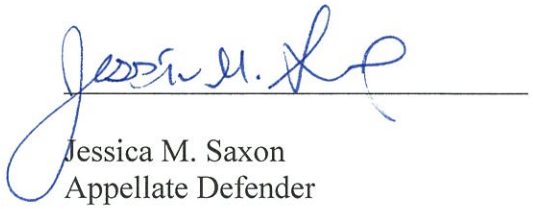
Finally, Respondent has misapprehended the issue on appeal. Respondent wrote "Appellant is seeking for this Court to strike information relating to [sic] ultimate the [sic] issue of his appeal of whether or not Appellant was released from custody within the ten-year time frame of Rule 609(b), SCRE." This is incorrect. The issue on appeal is 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, pg. 1. Part of Appellant's argument is that the release date information, which Respondent stated was "critical to the proper resolution of his appeal," was not presented to the trial court as required by the rules of evidence. Appellant is asserting as part of his argument that without that information the trial court could not have conducted a meaningful analysis as required by Colf, *supra*.

Appellant is asking this Court to strike information that was not before the trial court. The fact that it relates to the issue on appeal is immaterial. The State had the burden of proof at trial to *show, not speculate*, that Appellant's conviction fell within a ten-year time period. The State failed to meet that burden and cannot, on appeal, submit evidence of a fact that was not before the trial court to support its argument. To allow such would fly in the face of the rules of appellate procedure and well-settled case law.

V. Conclusion

For these reasons, Appellant respectfully requests that this Court grant Appellant's Motion to Strike and order that any reference to 2017, or December 31, 2015, be stricken from the Initial Brief of Respondent. Appellant additionally request that this Court require an Amended Initial Brief of Respondent to be served with those dated assertions which are outside of the record removed since that information was not before the trial court. Appellant further requests that this Court deny Respondent's Motion to Amend the Designation of Matters and decline to take judicial notice of a Respondent's Exhibit A.

Respectfully submitted,



Jessica M. Saxon
Appellate Defender

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Honorable Maite Murphy, Circuit Court Judge

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APPELLATE CASE NO. 2020-001397

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Reply to Respondent's Return to the Motion to Strike and Motion to Amend Designation of Matter 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), this 7th day of December, 2021.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT