Serial: 208020

IN THE SUPREME COURT OF MISSISSIPPI

No. 2014-KA-00123-SCT

STATE OF MISSISSIPPI ***Appellant***

v.

KEVIN SCOTT A/K/A KEVIN V. SCOTT A/K/A KEVIN VINCENT SCOTT A/K/A KELVIN SCOTT A/K/A KELVIN VINCENT SCOTT ***Appellee***

EN BANC ORDER

This matter is before the Court, *en banc*, on the Court's own motion. This Court finds supplementation of the record is "necessary to convey a fair, accurate, and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal." M.R.A.P. 10(e) & (f).

The State attached as Exhibit B to its appellant's brief a document titled "Petitioner's Proposed Findings of Fact and Conclusions of Law," which the State and Scott both agree was submitted by Scott's counsel to the Honorable Johnnie E. Walls, Jr., by email. The Bolivar County Circuit Court shall determine if this document was in fact submitted to Judge Walls by Scott's counsel prior to Judge Walls's January 14, 2015 order. If so, the circuit court shall order the record be supplemented with said document.

IT IS THEREFORE ORDERED that, within thirty days of the entry of this order, the Bolivar County Circuit Court shall determine if the document attached as Exhibit B to the State's appellant brief was in fact submitted to Judge Walls prior to his January 14, 2015 order. And if so, the court shall order that the record be supplemented with said document.

SO ORDERED, this the 18th day of October, 2016.

/s/ James D. Maxwell, II

JAMES D. MAXWELL II, JUSTICE

AGREE: WALLER, C.J., RANDOLPH, P.J., COLEMAN, MAXWELL AND BEAM, JJ.

KING, J., OBJECTS TO THE ORDER WITH SEPARATE WRITTEN STATEMENT JOINED BY DICKINSON, P.J., LAMAR AND KITCHENS, JJ.

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STATE OF MISSISSIPPI

v.

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KING, JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶1. Today this Court sua sponte issues an order mandating supplementation of the record in this appeal. This Court claims that pursuant to Mississippi Rule of Appellate Procedure 10(e) & (f), this action is "necessary to convey a fair, accurate, and complete account of what transpired in the trial court."[1] For the reasons stated herein, I object to the issuance of this

[1]Rule 10(e) & (f) state:

> (e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated in the record, the parties by stipulation, or the trial court, either before or after the record is transmitted to the Supreme Court or the Court of Appeals, or either appellate court on proper motion or of its own initiative, may order that the omission or misstatement be corrected, and, if necessary, that a supplemental record be filed. Such order shall state the date by which the correction or supplemental record must be filed and shall designate the party or parties who shall pay the cost thereof. . . .

order.

¶2. On January 21, 2014, the State filed its notice of appeal. On January 28, 2014, the State filed its designation of the record. That designation stated, "Having filed a timely Notice of Appeal this day, the appellant hereby designates the entire record in this case as this is a death penalty case and pursuant to M.R.A.P. Rule 10(b)(2), '[i]n cases where the defendant has received the death sentence, the entire record shall be designated.'"

¶3. On February 10, 2014, the State amended its designation of the record. That amended designation read, "having filed a timely Notice of Appeal this day, the appellant hereby designates the entire record of the ***Atkins*** hearing held in this case as this is a death penalty case and pursuant to M.R.A.P. Rule 10(b)(2), '[i]n cases where the defendant has received the death sentence, the entire record shall be designated.' The entire record for the purposes of this appeal is the complete record of the ***Atkins*** hearing held in the above styled and numbered cause in the Bolivar County Circuit Court on December 18-19, 2013 and January 10, 2014, and does not include prior proceedings in this years long case."[2]

¶4. On May 12, 2014, the record was filed with this Court. The Clerk's Office issued the briefing schedule on May 12, 2014.

> (f) Limit on Authority to Add to or Subtract From the Record. Nothing in this rule shall be construed as empowering the parties or any court to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate, and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal.

[2] ***Atkins v. Virginia***, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

¶5. On July 7, 2014, the State filed a motion to reissue the briefing schedule. Attached to that motion as Exhibit A was a motion presented to the Bolivar County Circuit Court seeking to correct deficiencies in the record. In Exhibit A, the State had described the deficiencies in the record as follows, "[t]hat the record, as transmitted to counsel, is deficient in that it did not contain the complete record of the ***Atkins*** hearing as none of the exhibits were included. Pursuant to the M.R.A.P. Rule 10(b)(2), this being a death penalty case, the entire record is designated, thus, the exhibits must be included. Further, the appellant's prior designation of record, submitted on February 10, 2014, specifically requested the entire record of the proceedings which occurred in the ***Atkins*** hearing in the above styled and numbered cause. Any review of the record cannot be completed unless and until the entire record is submitted to counsel for review. The entire record includes all exhibits offered at the ***Atkins*** hearing. None of the exhibits which were submitted at the hearing were included in the record that was reviewed by counsel on April 7, 2014."

¶6. On January 20, 2015, the State filed its appellant's brief. That brief included as one of the issues on appeal, "The Trial Court's judgment must be vacated and remanded so that it may issue its own findings of fact and conclusions of law and enter a new judgment on that basis." Within this issue, the State argues that the trial court adopted almost verbatim the proposed findings of fact and conclusions of law presented by Scott. The alleged offending findings of fact and conclusions of law are not included in the record to which the State gave its approval.

¶7. Additionally, there is no indication that the State has filed with this Court an objection to the accuracy or completeness of the record nor is there any indication that the State has requested an opportunity to supplement the record to include the alleged offending findings of fact and conclusions of law. This Court's first introduction to these alleged offending findings of fact and conclusions of law is an exhibit to the State's brief filed on January 20, 2015.

¶8. While briefs are informative, this Court consistently has stated that the briefs and attached exhibits are not a part of the trial record and cannot serve as a basis for this Court's decisions. "We have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions. Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise, we cannot know them." ***Brown v. State***, 152 So. 3d 1146, 1163 (Miss. 2014) (citations omitted);[3] *see also* ***Hansen v. State***, 592 So. 2d 114, 127 (Miss. 1991) (citations omitted) ("This Court 'must decide each case by the facts shown in the record, not assertions in the brief. . . .' The burden falls upon an appellant to ensure the record contains 'sufficient evidence to support his assignments of error on appeal.'");[4]

[3]In ***Brown***, the defendant who had been sentenced to life imprisonment without parole argued that "Shaking Baby Syndrome" was no longer medically valid and cited numerous experts, studies, and articles that were not included in the record to support his assertion.

[4]In ***Hansen***, the defendant was sentenced to the death penalty and raised a ***Batson*** claim on appeal. ***Id.*** at 126; ***Batson v. Kentucky***, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). This Court found that the record failed to suggest the race of the challenged juror and stated "[i]t is elementary that a party seeking reversal of the judgment of a trial court

Holland v. State, 705 So. 2d 307, 351 (Miss. 1997) (cases are decided on facts in record, not assertions in brief);[5] ***Keller v. State***, 138 So. 3d 817, 873-74 (Miss. 2014) ("The Court does not consider evidence outside the record.").[6] Likewise, this Court consistently has stated that the proponent of an issue has an obligation to insure that the record presented to this Court contains all relevant and necessary information for its decision. ***Bennett v. State***, 933 So. 2d 930, 944 (Miss. 2006) (defendant failed to meet burden of including necessary items in the record);[7] ***Jones v. State***, 776 So. 2d 643, 649 (Miss. 2000) (citations omitted) ("This Court has repeatedly held that '[we] will not consider matters which are outside the record and must confine [ourselves] to what actually does appear in the record.'");[8] ***Cage v. State***, 149 So. 3d 1038, 1047 (Miss. 2013) ("The appellant has a duty to justify his assignments of error with

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must present this Court with a record adequate to show that an error of reversible proportions has been committed and that the point has been procedurally preserved." ***Id.*** at 127 (quoting ***Queen v. Queen***, 551 So. 2d 197, 199 (Miss. 1989)).

[5]***Holland*** was a death penalty case in which the defendant argued that the trial court erred in his comments to the victim's family in front of the jury. ***Id.*** at 350. This Court held, *inter alia*, that the defendant made an insufficient record and thus no determination of the claim could be made. ***Id.*** 350-51.

[6]There, the defendant argued that this Court should examine Mississippi's method of capital punishment to determine whether it complied with the Eighth Amendment and asked the Court to consider an affidavit in a federal case that was not included in the record. ***Id.***

[7]The defendant, sentenced to the death penalty, failed to include enough evidence in the record to support his claim that the trial court's actions violated the rule of sequestration. ***Id.***

[8]In this capital murder case, the defendant argued that his right to a speedy trial was violated. ***Id.*** at 649-50. This Court found that there was not enough information in the record to address the issue adequately. ***Id.***

all the information necessary to establish an understanding of the matters relied upon for reversal.").[9] In this case, the State has failed to do so.

¶9. While the State has raised Scott's proposed findings of fact and conclusions of law as an issue, there is no indication that the State has undertaken even a feeble effort to properly include that information in the appellate record. This document was never made a part of the trial court record, yet the majority seems to suggest that because this is information that was said to be on the trial judge's computer, pursuant to Mississippi Rules of Appellate Procedure 10 (e)&(f), it is subject to a sua sponte supplementation order from this Court. The Court invokes this rule because it wishes to know what Judge Walls considered in reaching his decision.

¶10. I find the invocation of this Rule under these circumstances to be inappropriate. If the majority's reasoning is extended, it would not be inappropriate to mandate a search of the computer of the judge and his law clerk to see what legal research might have been done or what information might have been exchanged between the judge and his law clerk. This is a very slippery slope, and proceeding down it cannot be justified.

¶11. The State's specific issue is the extent to which the trial judge's findings mirror those proposed by Scott. This Court has not precluded trial courts from adopting the findings of fact and conclusions of law proposed by a party. ***Brooks v. Brooks***, 652 So. 2d 1113, 1125

[9]The defendant argued that an affidavit from his aunt showing that a juror did not answer a voir dire question truthfully should have been entered into the record. ***Id.***

(Miss. 1995); *see also* ***Bluewater Logistics, LLC v. Williford***, 55 So. 3d 148, 157 (Miss. 2011) ("We shall continue to apply the familiar abuse-of-discretion standard to a trial judge's factual findings, even where the judge adopts verbatim a party's proposed findings of fact."); ***Burnham v. Burnham***, 185 So. 3d 358, 360 (Miss. 2015) ("A chancellor's factual findings, even those adopted from a party, are reviewed for an abuse of discretion."). What this Court does seek is to be certain that the findings presented are in fact the findings of the trial court. Unless it is the intent of this Court to adopt such a policy of preclusion by inference, the sua sponte supplementation of the record being ordered in this case serves no acceptable purpose.

DICKINSON, P.J., LAMAR AND KITCHENS, JJ., JOIN THIS SEPARATE WRITTEN STATEMENT.