

Cite as 2019 Ark. 71
SUPREME COURT OF ARKANSAS
No. CR-17-954

ZAVIER MARQUIS PREE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered March 7, 2019

APPEAL FROM THE PULASKI COUNTY
CIRCUIT COURT
[NO. 60CR-15-2690]

HONORABLE HERBERT WRIGHT,
JUDGE

REMANDED TO SUPPLEMENT THE
RECORD.

PER CURIAM

Zavier Marquis Pree has appealed from his conviction by a Pulaski County jury of capital murder, aggravated robbery, and a firearm enhancement, for which he received, respectively, a sentence of life without parole, a concurrent term of forty years, and a consecutive term of ten years in the Arkansas Department of Correction. However, there are omissions in the record that must be corrected before this case is submitted. These omissions affect both the issue raised on direct appeal and our review pursuant to Arkansas Supreme Court One Rule 4-3(i).

A. Direct Appeal

One of the two issues that Mr. Pree raises on direct appeal concerns the denial of his motion to suppress his custodial statement. The entire interrogation was recorded. A transcript of the interrogation was submitted to the circuit court as an exhibit at the suppression hearing. However, we know from the circuit court's order disposing of the

motion to suppress, as well as an acknowledgment by the circuit judge on the record that he had viewed the video of the interrogation. Although Mr. Pree and the State agreed to the viewing, there is no indication by the circuit court of what exactly was viewed, as the viewing was done without counsel present. Only a redacted version of the interrogation, which was presented to the jury, is included in the record.

In our review, we are tasked with determining voluntariness of a custodial statement. In viewing the totality of the circumstances, we consider factors that include the age, education, and intelligence of the accused; the lack of advice as to his constitutional rights; the length of detention; the repeated and prolonged nature of questioning; the use of mental or physical punishment; the statements made by the interrogating officers; and the vulnerability of the accused. *Conner v. State*, 334 Ark. 557, 982 S.W.2d 655 (1998). The video is the best evidence of the above-referenced factors.

In accordance with Rule 6(e) of the Arkansas Rules of Appellate Procedure –Civil, we order the circuit court to supplement the record on appeal with a copy of the video that was viewed by the circuit court. Rule 6(e) states in pertinent part:

Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the circuit court, the difference shall be submitted by motion to, and settled by, that court and the record shall be made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, . . . the appellate court . . . on its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary, that a supplemental record be certified and transmitted.

It is incumbent on this court to review all the evidence that the circuit court had before it.

We therefore order that a copy of the video be placed in the trial record along with

appropriate certification by the circuit court. A copy of the video should also be placed in the addendum of the appellant's brief.

B. Arkansas Supreme Court Rule 4-3(i)

In a motion filed October 4, 2018, Pree's appellate counsel requested supplementation of the filed record because he identified several hearings and court appearances that had not been transcribed but had resulted in rulings that were adverse to his client. We granted the motion by formal order entered on November 2, 2018.

Pree's trial counsel, however, did not order every hearing and court appearance to be transcribed. He apparently reasoned that his obligation under Rule 4-3(i) to *abstract* only those hearings and court appearances that resulted in an adverse ruling for his client did not require the transcription of hearings where the circuit court's actions were not *adverse* to his client. Accordingly, Pree's trial counsel did not order transcription of the following:

- a. 01/19/2016: request for psychological evaluation granted
- b. 03/22/2016; appearance to receive State Hospital report; court set
04/12/2016: a subsequent report date
- c. 05/03/2016: appeared to receive State Hospital report; Pree was found fit to proceed
- d. 07/11/2016: court granted joint motion to continue omnibus hearing
- e. 07/28/2016: court denied a defense motion for a continuance, but later a continuance was granted on other grounds
- f. 09/20/2016: granting of the State's motion to continue the omnibus

hearing

- g. 01/18/2017: defendant's motion for a continuance was granted
- h. 03/15/2017: case continued
- i. 05/03/2017: defense motion for continuance granted because a defense witness failed to comply with a subpoena

We order that these hearings and court appearances be transcribed and added to the record on appeal.

It is so ordered.