

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

Honorable D. Craig Brown, Circuit Court Judge

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Jul 01 2022

S.C. SUPREME COURT

ALONZO TARELL JONES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2022-000158

MOTION TO HOLD APPEAL IN ABEYANCE
AND
MOTION TO REMAND FOR RECONSTRUCTION OF
POST-CONVICTION RELIEF HEARING

Pursuant to Rule 240 of the South Carolina Appellate Court rules, undersigned counsel requests an order requiring the parties to reconstruct petitioner's post-conviction relief hearing originally held before the Honorable G. Thomas Cooper on July 16, 2015. While this motion is pending, petitioner asks this Court to hold the timelines for filing his appendix and petition for certiorari in abeyance.

In support of his motion, petitioner would present the following:

1. The undersigned represents petitioner in his appeal before this Court.

2. The transcript from petitioner's post-conviction relief hearing cannot be produced or ascertained by the Court Reporter, Keshia Reed. (See letter from Court Reporter dated June 30, 2022, attached as Exhibit A).

3. To allow for meaningful appellate review, the record must be reconstructed.

PROCEDURAL HISTORY

4. Petitioner was indicted by a Kershaw County grand jury in February 2013 for unlawful carrying of a pistol. Petitioner waived presentment for resisting arrest.

5. Petitioner pled guilty to both offenses before the Honorable DeAndrea G. Benjamin on April 9, 2013 and was sentenced to concurrent terms of one year imprisonment for unlawful carrying of a pistol and one year imprisonment for resisting arrest.

6. Petitioner filed an application for post-conviction relief on April 8, 2014.

7. The state filed its Return on June 12, 2014.

8. An evidentiary hearing was held before the Honorable G. Thomas Cooper, Jr., on July 16, 2015, at the Richland County Courthouse. Ronald Moak represented petitioner; J. Clayton Mitchell appeared on behalf of the state.

9. Defense counsel Cornelius Riley was the only witnesses at the evidentiary hearing.¹

10. According to an Order of Dismissal signed by Judge Cooper on December 3, 2015, relief was denied on all claims.

11. Counsel Moak did not file an appeal on petitioner's behalf.

12. Petitioner filed a complaint with the Office of Disciplinary Counsel alleging that Moak failed to: inform petitioner his PCR hearing was scheduled, make arrangements for

¹ The December 3, 2015, Order of Dismissal only references testimony by defense counsel. The undersigned is unaware of any other witnesses.

petitioner to participate in his PCR hearing, advise petitioner that his claims were denied, and call or explain to petitioner what happened in regard to his PCR action

13. In November of 2016, petitioner filed a petition for a writ of Habeas Corpus in the original jurisdiction of this Court. On December 1, 2016, this Court issued an order stating that habeas relief was not proper as petitioner had not exhausted all other available remedies pursuant to *Gibson v. State*, 329 S.C. 37, 495 S.E.2d 426 (1998). In its order the Court advised petitioner to file a subsequent application for PCR to assert these claims.

14. On March 15, 2017, petitioner filed a second post-conviction relief action. The state filed its return March 4, 2021.

15. A hearing was held on January 24, 2022, to determine if petitioner was entitled to appellate review of the denial of his prior PCR application. At the conclusion of the hearing, the state conceded that petitioner had met his burden showing he was entitled to appellate review pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

16. On January 31, 2022, the Honorable D. Craig Brown signed an Order Granting Belated Appeal Pursuant to *Austin v. State*.

17. The undersigned's office requested the transcript from the July 16, 2015, hearing on June 1, 2022. The court reporter was unable to produce the transcript because the five-year window under Rule 607, SCACR, had closed. The court reporter advised "I no longer have my file or digital audio recordings for 2015." See Exhibit A.

ARGUMENT

When a trial transcript has been lost or destroyed, the Court may vacate the conviction and sentence and remand for a new trial if meaningful appellate review is not possible. See *Koon v. State*, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); *overruled on other grounds by State v.*

Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002); *Deaton v. Leath*, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983); *China v. Parrott*, 251 S.C. 329, 162 S.E.2d 276 (1968); *Dolive v. J.E.E. Developers, Inc.*, 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992); *State v. Ladson*, 373 S.C. 320, 325, 644 S.E.2d 271, 273-274 (Ct. App. 2007).

In *Deaton, supra*, the defendant's convictions were set aside, and a new trial had where the court reporter's equipment malfunctioned and there was no transcript of the trial court proceedings in the case from which to base an appeal. Citing *Deaton*, this Court denied a request for reconstruction in *State v. Serrette*, 375 S.C. 650, 652-653, 654 S.E.2d 554, 555 (Ct. App. 2007) where the reason for the lack of transcript was due to the defendant's absence for a ten-year period, which this Court explained was "not a situation where the court reporter's equipment malfunctioned at trial leading to a loss of the trial transcript." In the matter at hand, petitioner was not at fault for any of the difficulties in his case; rather, the transcript is not available from the court reporter due to matters outside petitioner's control. Upon realization that his prior PCR counsel did not perfect the appeal following the denial of his PCR application, Petitioner followed the proper procedure and filed another application under *Austin*.²

The case which first provided a remedy in the form of delayed appellate review, *Austin v. State*, saw this Court reverse the summary dismissal of a second PCR application and remand for an evidentiary hearing, where the petitioner alleged in his second application that his first PCR counsel was ineffective for failing to seek appellate review. 305 S.C. 453, 409 S.E.2d 395 (1991). Specifically, this Court stated: "Because petitioner

² The court reporter's tapes from Petitioner's post-conviction relief hearing were presumably available until July 2020, based on the timelines set forth in Rule 607(i), SCACR. In future cases, either PCR counsel or counsel for the state could request the tapes in cases involving belated review under *Austin* to keep the deadline from passing and the tapes being destroyed.

is entitled to the assistance of appellate counsel on PCR, and because we must craft a remedy to correct the unfairness which has occurred, we find his allegation that counsel failed to seek review in this case sufficiently states a claim for ineffective assistance.” *Id.* at 454, 409 S.E.2d at 396. Thus, “[u]nder *Austin*, a defendant can appeal a denial of a PCR application after the statute of limitations has expired if the defendant either requested and was denied an opportunity to seek appellate review or did not knowingly and intelligently waive the right to appeal.” *Odom v. State*, 337 S.C. 256, 260, 263, 523 S.E.2d 753, 755, 756 (1999) (“The one-year statute of limitations for PCR applications is not applicable to appeals filed pursuant to *Austin v. State*.”); *see also Whitehead v. State*, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002) (“We have held that the PCR statute of limitations found in S.C. Code Ann. § 17–27–45(A) (Supp.2001) does not apply to *Austin* claims.”).

Petitioner respectfully requests an order for the remand of this matter and subsequent reconstruction of petitioner’s PCR hearing to perfect the certiorari appeal in this case. A reconstruction hearing is appropriate because the absence of the PCR hearing transcript prevents this Honorable Court from conducting a meaningful appellate review. *Ladson* at 325, 644 S.E.2d 271, 274. *See also In re D.W.*, 171 N.C.App. 496, 615 S.E.2d 90, 94 (2005); *State v. Chanze*, 211 W.Va. 257, 565 S.E.2d 379, 382-83 (2002) (finding criminal defendant is entitled to meaningful appellate review of his lower court proceedings, and if this is not possible from a reconstructed record, a new trial is appropriate).

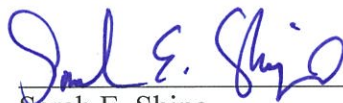
In the present case, the entire PCR hearing transcript cannot be produced. A reconstructed transcript of his PCR hearing is necessary for appellate counsel to represent him effectively, and for this Court to give meaningful appellate review of his conviction. Petitioner also respectfully requests that the Order remanding this matter contain language giving the trial court the option to

conclude that the record cannot be reconstructed with the specificity to support meaningful appellate review. “It is simply unrealistic and unreasonable to think that a trial judge and counsel can—under these circumstances—reconstruct a proper record that will permit meaningful appellate review, especially in light of our issue preservation rules.” *Ladson*, 373 S.C. at 326, 644 S.E.2d at 274.

While this motion is pending, petitioner asks this Court to hold the timelines for filing the petition for certiorari and appendix in abeyance. The undersigned discovered this predicament early and endeavored to prepare this motion before taking any extensions in petitioner’s case.

The undersigned emailed counsel for the state Russel Barlow regarding this matter on June 21, 2022, no response was received.

Respectfully submitted,



Sarah E. Shipe
Appellate Defender

This 1st day of July, 2022.