

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County
Edgar W. Dickson, Circuit Court Judge

RECEIVED

MAY - 2 2012

S.C. Supreme Court

JOHN ALLEN RANDOLPH, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

DAYNE C. PHILLIPS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 7

CONCLUSION 10

ISSUE PRESENTED

Did the PCR court err in finding that the reconstructed record of Petitioner's plea hearing was sufficient for meaningful appellate and collateral review where the solicitor admitted to having no recollection of the plea hearing, and no affidavit from the court reporter or the plea judge was provided to support the solicitor's speculative testimony?

STATEMENT

PCR Application and Evidentiary Hearing

On June 29, 2010, Petitioner John Randolph filed his application requesting post-conviction relief (PCR). App. 2 – 8. The Respondent filed its return on February 7, 2011. App. 9 – 13. An evidentiary hearing was held before the Honorable Edgar W. Dickson on March 8, 2011. App. 14 – 74. Petitioner was represented by James Jackson, and the Respondent was represented by Mary Williams. App. 14.

Plea Hearing Transcript is Unavailable

At the evidentiary hearing, the Respondent informed the PCR court that the court reporter at Petitioner’s guilty plea proceeding, Harry A. Walker, indicated in a letter to the South Carolina Attorney General’s Office on September 24, 2010, that “after [an] extensive search[,] I am unable to locate my records in this matter. *Therefore, I cannot provide you with this transcript.*” App. 1 (emphasis added). The Respondent attempted to reconstruct the record at the evidentiary hearing by calling Kelley Burbage, the assistant solicitor who was assigned to Petitioner’s case, to testify about Petitioner’s plea hearing. App. 16, l. 4 – 18, l. 25. It is undisputed that Petitioner appeared before the Honorable James C. Williams on January 4, 2010. App. 76.

Assistant Solicitor Kelley Burbage testified, “*I do not have any independent recollection of this particular plea . . . As far as actually doing the plea that day[,] I don’t have any recollection of it.*” App. 18, l. 22 – 19, l. 1 (emphasis added). Burbage did “*provide the Court [with] . . . information regarding the general questions that Judge Williams might normally ask.*” App. 19, ll. 3-5 (emphasis added). Notably, the Respondent failed to provide an affidavit from Judge Williams or the court reporter to support Burbage’s speculative testimony and plea counsel’s claim that “[i]t was a typical guilty plea.” App. 65, ll. 22-25.

Without any recollection of Petitioner's plea hearing, Burbage continued to testify as to what *might have* occurred at Petitioner's plea hearing. Specifically, Burbage testified that Petitioner pled guilty: (1) to trafficking twenty-eight to one-hundred grams of cocaine, first offense; (2) to trafficking ten to twenty-eight grams of crack cocaine, first offense; (3) possession with intent to distribute (PWID) marijuana; and (4) the unlawful carrying of a pistol. App. 20, ll. 9-20; 92 – 95. Burbage also stated that several charges were dismissed “as a condition of the plea[.]” App. 20, l. 20 – 21, l. 1; 96 – 101. Burbage noted that according to the plea and sentencing sheets, Judge Williams accepted the State's recommendation and sentenced Petitioner: to eight years imprisonment for the trafficking cocaine conviction; eight years imprisonment for the trafficking crack cocaine conviction; to five years imprisonment for the PWID marijuana conviction; and to one year imprisonment for the unlawful carrying of a pistol conviction, to run concurrently for a total of eight years imprisonment.¹ App. 96 – 105.

Burbage further stated, although the sentencing sheets indicate that Petitioner waived presentment to the Orangeburg County Grand Jury for those four charges, she did not “have any independent recollection” of whether Petitioner waived presentment to those charges. App. 23, ll. 7-25. Burbage admitted that the sentencing sheets “could have been filled out [prior to the plea], and then someone else actually handled the actual plea that day” App. 23, l. 7 – 26, l. 7; 102 – 105. Burbage also admitted that she could not testify as to what facts were presented to Judge Williams at Petitioner's plea hearing, or whether Petitioner was under the influence, or had a competency issue at the plea hearing. App. 24, ll. 3-7; 28, ll. 3-23.

Plea counsel, Carl Grant, claimed that “[i]t was a typical guilty plea, with the Judge going through the colloquy between the defendant and himself” and that he would have objected if the

¹ Burbage recalled negotiating a plea deal with Carl Grant. App. 28, l. 24 – 29, l., 8.

plea colloquy was improper. App. 65, l. 25 – 66, l. 25. Plea counsel also maintained at the evidentiary hearing that he met with Petitioner on numerous occasions and reviewed the discovery with Petitioner prior to the plea hearing. App. 60, l. 10 – 61, l. 23. Plea counsel further stated that Petitioner was facing a minimum sentence of twenty-five years and a maximum sentence of “seventy-seven years in prison.” App. 62, l. 24 – 63, l. 23.

Plea counsel maintained that he explained to Petitioner the possibility of moving to suppress the statements and drugs. App. 70, ll. 3-5. Plea counsel also stated, “I told [Petitioner] he had ten days from the date that he pleads guilty to file a Notice of Intent to Appeal” App. 68, ll. 20-22. Plea counsel further claimed that Petitioner never asked him to file an appeal and that he did not know Petitioner had tried to contact him about appealing his guilty plea conviction. App. 68, l. 25 – 69, l. 8.

Petitioner testified at the evidentiary hearing that he was never read his Miranda² rights after being handcuffed and interrogated by the police. App. 44, l. 9 – 46, l. 7. Petitioner also testified that the police report was inaccurate because he never admitted to possessing the drugs or guns seized by the police. App. 47, ll. 1-23. Petitioner further testified that plea counsel never explained to him that if he pled guilty, he could not later challenge law enforcement’s failure to read his Miranda rights to him prior their interrogation. App. 50, l. 21 – 21, l. 1.

As to the factual basis of the plea, Petitioner unequivocally denied confessing to the ownership of the drugs. App. 54, ll. 15-17. As to the mitigation evidence presented at the plea hearing, Petitioner stated that plea counsel failed to inform Judge Williams about Petitioner not having a prior record, being an Army Veteran, or him testifying on behalf of the State in a murder case. App. 51, l. 12 – 54, l. 9.

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

Furthermore, Petitioner testified that plea counsel never informed him regarding his right to appeal his conviction and sentence. App. 51, ll. 2-3. Petitioner recalled that he knew about the eight year plea offer, that he was aware that he had a right to a jury trial, and that he understood what he was doing when he pled guilty. App. 50, ll. 7-20. Petitioner also testified on cross-examination that he tried to contact plea counsel while he was incarcerated “to tell him to file an appeal,” but was unable to do so. App. 57, ll. 22-25.

Order of Dismissal

On July 18, 2011, Judge Dickson ruled in his Order of Dismissal that Petitioner failed to prove plea counsel provided ineffective assistance of counsel and denied Petitioner PCR relief. App. 75 – 81. Relevant to this petition, the PCR court found: “*While the absence of a transcript is always of concern to the court, I find that the testimony developed at [the] PCR hearing was sufficient to permit this court’s review.*” App. 75 (emphasis added). The PCR court also found “that [plea] counsel was not ineffective with regard to his investigation” and that “[c]ounsel’s failure to consult with [Petitioner] about an appeal in this case [is] not unreasonable.” App. 79 – 80.

ARGUMENT

The PCR court erred in finding that the reconstructed record of Petitioner’s plea hearing was sufficient for meaningful appellate and collateral review because the solicitor admitted to having no recollection of the plea hearing, and no affidavit from the court reporter or the plea judge was provided to support the solicitor’s speculative testimony.

The solicitor who was assigned to Petitioner’s case admitted at the PCR/reconstruction hearing, “*I do not have any independent recollection of this particular plea . . . As far as actually doing the plea that day[,] I don’t have any recollection of it.*” App. 18, l. 22 – 19, l. 1 (emphasis added). The Respondent also failed to provide an affidavit from the plea judge or the court reporter to support plea counsel’s claim that “[i]t was a typical guilty plea” and the solicitor’s speculative testimony “*regarding the general questions that Judge Williams might normally ask.*” App. 19, ll. 3-5; 65, ll. 22-25 (emphasis added). Therefore, the PCR court erred in finding that the reconstructed record of Petitioner’s plea hearing was sufficient for meaningful appellate and collateral review. App. 75; *See State v. Ladson*, 373 S.C. 320, 325, 644 S.E.2d 271, 274 (Ct. App. 2007) (finding “[a] new trial is appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review”) (internal quotation omitted).

In *China v. Parrott*, 251 S.C. 329, 162 S.E.2d 276 (1968), this Court held that South Carolina appellate courts have the authority to remand a case for reconstruction of the record when a transcript has been lost or destroyed. *Cf. Ladson*, 373 S.C. at 326, 644 S.E.2d at 274 (finding “[i]t is simply unrealistic and unreasonable to think that a trial judge and counsel can—under these circumstances [original trial occurred more than one year before the reconstruction hearing]—[to] reconstruct a proper record that will permit meaningful appellate review, especially in light of our issue preservation rules”). This Court also held in *Parrott* that the trial judge properly considered affidavits from trial counsel and the court reporter in reconstructing

the record for appeal where a portion of the court reporter's notes were lost. *Parrott*, 251 S.C. at 334, 162 S.E.2d at 278; *Cf. Deaton v. Leath*, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983) (granting the appellant's motion to set aside convictions and remand for a new trial 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).

In this case, the court reporter for Petitioner's plea hearing, Harry A. Walker, indicated in a letter to the South Carolina Attorney General's Office on September 24, 2010, that "after [an] extensive search[,] I am unable to locate my records in this matter. *Therefore, I cannot provide you with this transcript.*" App. 1 (emphasis added). The Respondent attempted to reconstruct the record at the evidentiary hearing by calling Kelley Burbage, the assistant solicitor who was assigned to Petitioner's case, to testify about Petitioner's plea hearing. App. 16, l. 4 – 18, l. 25. However, Burbage admitted that she could not testify as to: (1) whether she was present at the plea hearing; (2) what facts were presented to Judge Williams at the plea hearing; or (3) whether Petitioner was under the influence or had a competency issue at the plea hearing. App. 23, l. 7 – 28, l. 23.

Same as in *Ladson*, "the original [plea hearing] took place more than a year before this reconstruction hearing," and the witness testimony was based on mostly pure speculation. App. 18, l. 1 – 36, l. 2; *Ladson*, 373 S.C. at 321-22, 644 S.E.2d at 271-72, n. 1. Even with plea counsel's testimony, without affidavits from the court reporter or the plea judge, "we are essentially left with a bare bones summary of the evidence" and "are left to speculate" as to what actually occurred at Petitioner's plea hearing. *Id.* at 327, 644 S.E.2d at 274 (citing *In re Rholetter*, 162 N.C. App. 653, 592 S.E.2d 237, 244 (2004) (finding "[i]f a transcript is altogether inaccurate and no adequate record of what transpired at trial can be reconstructed, the court must

remand for a new trial)); *Cf. Parrott*, 251 S.C. at 334, 162 S.E.2d at 278. Accordingly, the PCR court erred in finding that the reconstructed record of Petitioner's plea hearing was sufficient for meaningful appellate and collateral review because the State provided only a "conclusory and summary nature" of the plea hearing. App. 75; *Ladson*, 373 S.C. at 325, 644 S.E.2d at 274; *See generally Deaton v. Leath*, 279 S.C. at 84, 302 S.E.2d at 336.

CONCLUSION

Based on the foregoing reasons, John Randolph's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,


Dayne C. Phillips
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of May, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County
Edgar W. Dickson, Circuit Court Judge

JOHN ALLEN RANDOLPH, JR.,

PETITIONER,

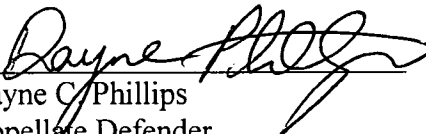
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

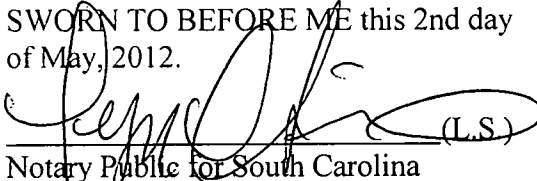
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Mary S. Williams, Esquire, and John Allen Randolph, Jr. #338722, this 2nd day of May, 2012.


Dayne C. Phillips
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of May, 2012.


(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.