

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

D. Craig Brown, Circuit Court Judge

RECEIVED

Mar 13 2023

S.C. SUPREME COURT

EDWARD KIRK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2022-001823

MOTION TO HOLD APPEAL IN ABEYANCE
AND
MOTION TO REMAND FOR RECONSTRUCTION OF
GUILTY PLEA HEARING

Pursuant to Rule 240 of the South Carolina Appellate Court rules, undersigned counsel requests an order requiring the parties to reconstruct Petitioner's guilty plea hearing originally held before the Honorable Jocelyn Newman on June 28, 2016. 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 guilty plea hearing cannot be produced or ascertained. (See e-mail from legal assistant at the South Carolina Attorney General's

Office dated January 10, 2023, attached as Exhibit A and e-mail from Tammie Holmes, Court Reporter Manager, dated January 12, 2013 attached as Exhibit B).¹

3. In order to allow for meaningful appellate review, the record must be reconstructed.

PROCEDURAL HISTORY

4. Petitioner was indicted by a Richland County grand jury in August 2015 for armed robbery (2015-GS-40-4155), pointing and presenting a firearm (2015-GS-40-4156), and kidnapping (2015-GS-40-4161).

5. Anna Good represented Petitioner; April Sampson appeared on behalf of the state.

6. As noted above, Petitioner pled guilty before the Honorable Jocelyn Newman on June 28, 2016. The state recommended a sixteen year sentence, which Judge Newman handed down on the armed robbery and kidnapping offenses, concurrent. Judge Newman sentenced Petitioner to five years on the pointing and presenting charge.

7. On June 8, 2021, Petitioner filed an application for post-conviction relief with the Richland County Clerk of Court (Exhibit C). On the third page, he contends that he filed a *pro se* appeal with the South Carolina Court of Appeals. He also alleges that he asked plea counsel to file a notice of appeal.

8. On or about August 18, 2021, the state filed its Return and Partial Motion to Dismiss (Exhibit D).

¹ Under Rule 607(i), SCACR, court reporters are required to retain the tapes from proceedings for a period of only five years.

9. The Honorable D. Craig Brown signed a Consent Order Granting Belated Appellate Review Pursuant to White v. State on November 17, 2022 (Exhibit E). According to the Order, no evidentiary hearing occurred (counsel for the state “informed the court that the parties had reached a consent resolution to the matter and presented the proposed resolution to the court”).

10. The PCR court granted relief “in the form of a belated appeal only.” A Notice of Appeal was filed with this Court on December 30, 2022.

11. An Administrative Coordinator for the South Carolina Commission on Indigent Defense, Sean Flynn, then contacted the South Carolina Attorney General’s Office to procure documents to be included in the Appendix under Rule 243, SCACR.

12. Flynn was told that the transcript did not exist. He then checked with the State Grand Jury Division at the South Carolina Attorney General’s Office but was again advised that the transcript did not exist and could not be produced.

13. Another Administrative Coordinator for the South Carolina Commission on Indigent Defense, Della White, attempted to obtain the guilty plea transcript but was told that it cannot be produced.

ARGUMENT

The transcript of the guilty plea cannot be produced based on the number of years that have elapsed since it occurred.

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 attempted to file a *pro se* appeal with the South Carolina Court of Appeals. For reasons unknown, his case was never assigned an Appellate Case Number or assigned to an Appellate Defender at the South Carolina Commission on Indigent Defense. As it stands, the transcript from his guilty plea is unavailable, and the state has consented to belated appellate review.

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 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 guilty plea hearing in order to perfect the certiorari appeal in this case. A reconstruction hearing is appropriate because the incomplete nature of the plea hearing transcript prevents this Honorable Court from conducting 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).

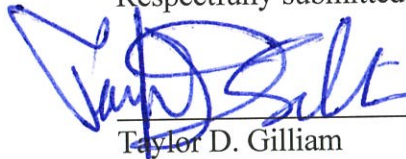
In the present case, the guilty plea transcript cannot be produced. A reconstructed transcript of this hearing is necessary for appellate counsel to represent him effectively, and for this Court to give meaningful appellate review of his conviction. Petitioner also

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 his 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.

By way of e-mail earlier today, March 13, 2023, opposing counsel consented to this request.

Respectfully submitted,



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