THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM McCORMICK COUNTY

Court of General Sessions

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Case No. J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

S.C. Ct. App.Order filed October 21, 2013

State of South Carolina,

Respondent,

v.

Joe Ross Worley

Petitioner.

PETITION FOR WRIT OF CERTIORARI

Desa Ballard
Harvey M. Watson, III

BALLARD WATSON WEISSENSTEIN
P.O. Box 6338
West Columbia, South Carolina 29171
Telephone: 803-796-9299
Facsimile: 803-796-1066
Email: desa@desaballard.com
harvey@desaballard.com

Carson Henderson
THE HENDERON LAW FIRM, PC
109-B Oak Avenue
Greenwood South Carolina 29646
Telephone 864.229.8000
Facsimile 864.229.8001
Email: carson@carsonhendersonlawfirm.com

Billy J. Garrett Jr., Esquire
GARRETT LAW FIRM, PC
109 Oak Avenue
Greenwood South Carolina 29646
Telephone 864.229.8000
Facsimile 864.229.8001
Email: tgarretlaw@hotmail.com

ATTORNEYS FOR PETITIONER

Other Counsel of Record
Mark R. Farthing
Post Office Box 11549
Columbia, South Carolina 29211

INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing on the merits issue was made and finally ruled on by the Court of Appeals on October 21, 2013.

QUESTIONS PRESENTED

I. HAS THE COURT OF APPEALS STOPPED EFFORTS TO PROTECT PETITIONER'S SUBSTANTIAL CONSTITUTIONAL RIGHT TO A MEANINGFUL APPELLATE REVIEW, AND THEREBY CREATED NOVEL QUESTIONS AS TO THE APPROPRIATENESS OF AN ORDERED DELAY IN RECONSTRUCTION OF THE RECORD?

II. HAS THE COURT OF APPEALS ISSUED AN ADVISORY OPINION REGARDING THE MANNER IN WHICH THE TRIAL COURT SHOULD PROCEED TO TRIAL FOLLOWING IMMUNITY DENIAL THAT CONFLICTS WITH A PRIOR DECISION OF THE SUPREME COURT?

STATEMENT OF THE CASE

Pursuant to Rule 242, SCACR, Petitioner Joe Ross Worley moves for an order granting a writ of certiorari to the Court of Appeals regarding the Order of the Court of Appeals on August 21, 2013 (rehearing denied, October 21, 2013) in *State v. Joe Ross Worley*. In the alternative, Petitioner seeks a writ of prohibition vacating that portion of the Court of Appeals' order which provided advisory instructions for how the trial of this matter should be conducted.

Petitioner was arrested on November 9, 2009 and later charged as a result of his firing of a rifle in the middle of the night at a then unknown person. (Appendix p. 1-2). Petitioner remains incarcerated, without bail, for now more than three years during these proceedings.

Petitioner raised as a defense to his pending charges the immunity from criminal prosecution afforded by the "Protection of Persons and Property Act" at S.C. Code Ann. § 16-11-401 *et seq.* (hereinafter "the Act"). The Honorable William P. Keesley held a pre-trial hearing on the applicability of immunity provided by the Act on May 31, 2011 and June 1, 2011. On July 5, 2011, Judge Keesley issued an Amended[1] Order on Motion to Bar Prosecution, denying Petitioner's assertion of immunity pursuant to the Act. (Appendix p. 1-16). In that order, Judge Keesley recused himself from further proceedings in the action. Thereafter, however, by order filed December 8, 2011, Judge Keesley issued an Amended Order on Reconsideration of the Defendant's Motion to Bar Prosecution, affirming his denial of immunity. (Appendix p. 17-40). Based on this

[1] The initial order was issued on June 24, 2011, but later amended to correct scrivener's errors.

HMW

Court's mandate that such appeals must be taken before trial[2], Petitioner timely filed a notice of appeal with the Court of Appeals on January 20, 2012. (Appendix p. 102).

Petitioner filed his amended initial brief with the Court of Appeals on January 9, 2013. (Appendix p. 129-164). In response, Respondent filed a Motion to Remand, seeking remand to the trial court for reconstruction of the record below which was incomplete by virtue of an incomplete hearing transcript[3]. (Appendix p. 169). Petitioner filed a return agreeing with the request for remand in principle, but arguing against the nature of remand with limitations as requested by Respondent. (Appendix p. 218). Petitioner subsequently filed his own Motion for Remand, clarifying the nature and extent of remand that Petitioner believed necessary in light of the failure to possess a full record upon which his appeal of the denial of immunity could be heard, and in response to Respondent's attempts to request restrictions on the manner of reconstruction. (Appendix p. 222). The Respondent filed a return to that motion, (Appendix p. 231), and Petitioner filed a Reply. (Appendix p. 260).

By Order of the Court of Appeals on March 28, 2013, the case was remanded back to the trial court for reconstruction of the missing testimony which was necessary for inclusion in the record on appeal. (Appendix p. 168). On June 14, 2013, a hearing was held for the purpose of reconstructing missing portions of the record. (Appendix p. 41). Following the hearing, Judge Keesley circulated a draft order for comment by all parties, and the Court of Appeals was updated on the progress of reconstruction. (Appendix p. 277).

---

[2] State v. Duncan, *infra.*

[3] Petitioner's own testimony from the pretrial hearing, including back up tapes, paper and electronic recording, was stolen while in the possession of the court reporter. (Appendix p. 101).

On August 21, 2013, this Court issued its opinion in State v. Isaac, changing the manner in which appeals from a denial of immunity pursuant to the Act, such as is at issue in the matter *sub judice*, are handled. 405 S.C. 177, 747 S.E.2d 677. That opinion distinguished instances of a grant of immunity, which remain immediately appealable pursuant to State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011), from *denials* of immunity. The logical conclusion of Isaac was that orders denying immunity under the Act (which would be appeals by the person charged with a crime), are orders that may be appealed only *after* conclusion of the criminal charges against the defendant. Isaac at p. 185, 681.

The day the Isaac opinion was issued, Respondent filed a Motion to Dismiss Petitioner's Appeal. (Appendix p. 263). Before Petitioner could respond, the Court of Appeals dismissed the appeal the very same day, citing that day's Isaac opinion, but gratuitously instructing the parties how to handle the missing record when the case was tried[4]. (Appendix p. 269). Petitioner filed a Motion for Rehearing and/or Amendment. (Appendix p. 272). That petition was denied by order dated October 21, 2013. (Appendix p. 271). Judge Keesley ceased his efforts to issue an order on the remand after the Court of Appeals dismissed Petitioner's appeal and denied rehearing. (Appendix p. 279).

It is respectfully asserted that this Court should issue a writ of certiorari to review the order of the Court of Appeals on the following grounds:

A. The order suspends indefinitely necessary and partially completed efforts to reconstruct the missing testimony, which is required to protect Petitioner's

[4] It is unclear whether the Court of Appeals' order dismissing the appeal was done *sua sponte*, or in response to Respondent's motion. It is unknown, at last to Petitioner, which came first.

substantial constitutional right to allow for eventual meaningful appellate review of a denial of immunity;

B. A novel question exists as to whether an active reconstruction of the record, already underway pursuant to Court of Appeals' order, can be halted when a new decision is issued that changes the timing for an appeal of the sort already upon on review at the time the law changes.

C. The Court of Appeals issued an advisory opinion regarding the manner in which the trial court should proceed with trial in light of State v. Isaac following immunity denial; and

D. Novel questions exist about the means by which trial can proceed following a denial for immunity, especially in the context of a record already known to be incomplete, when reconstruction is best accomplished sooner rather than later.

E. In the alternative, Petitioner seeks a writ of prohibition vacating (or preventing the trial court from being bound by) the advisory opinion issued *sua sponte* by the Court of Appeals when dismissing the appeal.

ARGUMENT

Petitioner filed an appeal from an order denying Petitioner the immunity provided under the "Protection of Persons and Property Act" at S.C.Code Ann. § 16-11-401 *et seq.* (Supp. 2012) ("the Act"). Based on precedent existing at the time of the trial court's ruling, Petitioner was required to take an immediate appeal of that order denying immunity under the Act. See State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). During the period in which Petitioner's motion to reconsider in the trial court was pending, Petitioner discovered portions of the transcript of the pretrial hearing conducted on the issue of statutory immunity were missing. (Appendix p. 101). Critically, Petitioner's own testimony[5] constitutes the bulk of the missing portion of the transcript.

Petitioner agrees that the decision of the Supreme Court in State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013) clearly establishes now that his existing appeal is interlocutory, thus warranting the holding of the present appeal in abeyance until the conclusion of the criminal charges when it may be heard. However, the Court of Appeal's order doing so incorrectly directs that reconstruction of the record related to the previously held immunity hearing should be somehow be abandoned, yet still take place at trial, in the advisory manner directed by the order. None of these issues were before the Court of Appeals, yet were dictated *sua sponte* by the Court of Appeals in the order dismissing the appeal.

I. THE COURT OF APPEALS STOPPED EFFORTS TO PROTECT PETITIONER'S SUBSTANTIAL CONSTITUTIONAL RIGHT TO A MEANINGFUL APPELLATE REVIEW, AND THEREBY CREATED A

[5] Of significant importance is the obligation of the criminal defendant, who carries the burden of proof under the Act, to explain to a court why he felt the need to defend himself. How that comports with the right to remain silent pursuant to the Fifth Amendment to the U.S. Constitution is, as yet, unknown.

NOVEL QUESTION AS TO THE APPROPRIATENESS OF AN ORDERED DELAY IN RECONSTRUCTION OF THE RECORD.

The record of the previously held immunity hearing pursuant to the Act held below as a whole is necessary for proper appellate review, whenever that occurs. See Rule 210(h), SCACR ("the appellate court will not consider any fact which does not appear in the Record on Appeal."); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("When an appellate court rules on an issue not preserved for appellate review, the portion of the appellate court's opinion pertaining to the unpreserved issue should be vacated.). Additionally, due process considerations apply, since an individual and his liberty interests are affected by the determination regarding immunity pursuant to the Act, and therefore the Petitioner must receive certain procedural protections, including "the right to meaningful judicial review." Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 352, 353-54 (2008).

A. Reconstruction of the missing testimony was underway and virtually completed. The Court of Appeals halted that process, prejudicing future efforts to present a sufficient record to afford eventual meaningful review by the appellate court.

South Carolina jurisprudence recognizes the trial court's authority to set the record for appeal. State v. Ladson, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007). When a transcript has been lost or destroyed, an appellate court may remand to have the record reconstructed by the trial court. Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002). Although the trial court may accomplish that reconstruction through various means. Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012). Regardless of effort by the trial court, however, an appellate court must have a sufficient record, including a sufficient transcript as a part thereof, to allow for a

"meaningful appellate review." State v. Ladson, 373 S.C. 320, 321, 644 S.E.2d 271 (Ct. App. 2007) ("Because we find the reconstructed record insufficient for meaningful review of direct appeal issues, we reverse and remand for a new trial.").

The Court of Appeals ordered reconstruction of the record on March 28, 2013. (Appendix p. 168). A hearing was held thereafter in the trial court just for that sole purpose, during which witnesses testified and documentary evidence was proffered. (Appendix p. 41-100). The parties and presiding judge exchanged information after the hearing, and Judge Keesley circulated an initial draft order for reconstruction of the record on August 6, 2013. (Appendix p. 277). Pursuant to its directive, the Court of Appeals received an update on the status of the reconstruction on August 14, 2013. (Appendix p. 281). An appropriate attempt at seeking to protect Petitioner's right to eventual meaningful review was nearing completion. (Appendix p. 277).

B. The Court of Appeals responded to State v. Isaac by not just delaying appellate review of Petitioner's appeal, but by ending the appropriate process that would allow for such eventual appeal.

The Supreme Court's ruling in *Isaac* came down on August 21, 2013, just one week after the parties had provided the Court-ordered update to the Court of Appeals on the reconstruction process. (Appendix 281). The decision in Isaac still allows for the appeal of denied immunity pursuant to the Act, but merely delays such an appeal until after final judgment the case. State v. Isaac, 405 S.C. 177, 185, 747 S.E.2d 677, 681 (2013). However, the Court of Appeals order rescinding its remand for reconstruction in this matter goes further than merely turning over proceedings back to the trial court for eventual, potential appeal after final judgment.

Instead, the order states that "reconstruction will no longer be necessary", which is simply incorrect. The Court of Appeals halted a very much necessary process shortly before its conclusion with an erroneous statement of the law. (Appendix p. 269). It has been stated that "justice delayed is justice denied" but in the specific context of record reconstruction, the Court of Appeals has already affirmatively stated that substantial delay between original event and reconstruction creates an "uphill struggle" that eventually may be untenable. State v. Ladson, 373 S.C. 320, 322, 644 S.E.2d 271, 272 (Ct. App. 2007). Already more than two and a half years have lapsed between the pre-trial immunity hearing and the present[6], and unknown further delays may lie between now and final judgment on the pending criminal charges, while all the while Petitioner's supposed right to meaningful review diminishes. It would be inappropriate, to an extent justifying this Court's action, to allow the near completed reconstruction process to be terminated at this time as directed by the Court of Appeals.

II. THE COURT OF APPEALS ISSUED AN ADVISORY OPINION REGARDING THE MANNER IN WHICH THE TRIAL COURT SHOULD PROCEED TO TRIAL FOLLOWING IMMUNITY DENIAL THAT CONFLICTS WITH PRIOR DECISION OF THE SUPREME COURT.

Numerous issues remain unanswered by the Supreme Court's decision in Isaac, including the manner in which the trial judge should deal with a pretrial ruling which denies immunity under the Act, especially when there exists a known-to-be-incomplete record of pre-trial proceedings mandated by the Act as interpreted by the Supreme Court in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011).

[6] Most of the delay has been caused, ironically, by Petitioner's obligation to appeal Judge Keesley's order as required by Duncan, and his own efforts to provide reconstructed testimony without the necessity of a remand. Thus by seeing to expedite the appeal which was required by *Duncan*, irreparable damages has already been done to Petitioner's ability to defend himself by presenting a sufficient appellate record.

A. The Court of Appeals order is advisory.

The Court of Appeals' order includes language directing that the "parties should proffer to the court any testimony relevant to the immunity motion that is not presented to the jury." (Appendix p. 269). That portion of the order, directing the manner in which denial of immunity pursuant to the Act should be accommodated at a forthcoming trial, does not result from any adjudication of the procedural issues, nor is it the obvious or explained manner for proceeding from the Supreme Court's decision in Isaac. As such, it is an advisory opinion. Tellingly, the Court of Appeals' order is recognition that novel issues regarding denial of immunity pursuant to the Act require the Supreme Court's consideration and guidance.

B. The Court of Appeals Order conflicts with a prior decision of Supreme Court.

Further, as written, the Court of Appeals' order would require Petitioner to defend himself at trial on the actual criminal charges before the jury, while simultaneously making further effort in parallel, related non-jury setting to present and preserve grounds for immunity. That advisory opinion invades the province of the trial court and its authority to direct the manner of trial, but also contradicts the mandates of Duncan and its determination that immunity issues pursuant to the Act can, and must, be determined pre-trial. It also jumbles, or perhaps overlooks, Petitioner's right to remain silent at trial with the obligation, imposed upon Petitioner by the Court of Appeals' order, that he offer testimony as to why the Act should provide immunity.

Certiorari is necessary to prevent further prejudice to Petitioner. This Court has to provide guidance in a sea of uncertainty for the trial process created by the Isaac decision.

C. A writ of prohibition is appropriate in light of the Court of Appeals order.

Alternatively, a writ of prohibition should be issued to vacate that portion of the Court of Appeals' order which provided guidance to the trial judge as to how the trial of the criminal matter should occur. The trial judge needs to know that s/he is not bound by the Court of Appeals' advisory opinion.

Petitioner realizes that a writ of prohibition is extraordinary.

> "With regard to the function and scope of the writ, it has been settled in this state from an early period that it will only lie to prevent an encroachment, excess, usurpation, or improper assumption of jurisdiction on the part of an inferior court or tribunal, or to prevent some great outrage upon the settled principles of law and procedure; but, if the inferior court or tribunal has jurisdiction of the person and subject-matter of the controversy, the writ will not lie to correct errors and irregularities in procedure, or to prevent an erroneous decision or an enforcement of an erroneous judgment, or even in cases of encroachment, usurpation, and abuse of judicial power or the improper assumption of jurisdiction, where an adequate and applicable remedy by appeal, writ of error, certiorari, or other prescribed methods of review are available."
>
> Berry v. Lindsay, 256 S.C. 282, 288, 182 S.E.2d 78 (1971) (citing State Board of Bank Control v. Sease, 188 S.C. 133, 198 S.E. 602 (1938)).

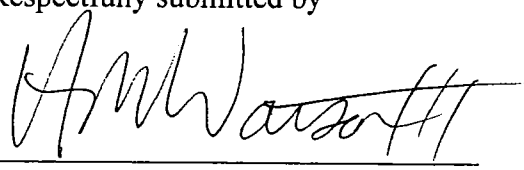
Without the intervention of this Court, there is no remedy available to Petitioner to prevent the further prejudice of his rights. If the trial judge is bound by an advisory opinion issued by the Court of Appeals *sua sponte*, on an issue which was not pending before that Court, the trial judge's own judicial responsibility will have been usurped. State v. Sheppard, 391 S.C. 415, 420, 706 S.E.2d 16, 18 (2011)("The conduct of a criminal trial is left largely to the sound discretion of the trial judge"); State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 494-95 (2013)("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by

probable prejudice.). "[U]nscrambling an egg" will not be possible, and "when justice cannot be meted out exactly, we do that which is next best – try to bring an end to the dispute." Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp., 282 S.C. 415, 419, 321 S.E.2d 46, 48 (1984). The appropriate end is to finish the reconstruction, or at minimum prohibit the Court of Appeals from interfering with the same.

Conclusion

In this most unusual circumstance, this Court's intervention is required, whether by Writ of Certiorari or by Writ of Prohibition.

Respectfully submitted by



Desa Ballard
Harvey M. Watson III
BALLARD WATSON WEISSENSTEIN
P.O. Box 6338
West Columbia, South Carolina 29171
Phone: 803.796.9299
Fax: 803.796.1066
Email: desa@desaballard.com
harvey@desaballard.com

Carson Henderson
THE HENDERON LAW FIRM, PC
109-B Oak Avenue
Greenwood South Carolina 29646
Telephone 864.229.8000
Facsimile 864.229.8001
Email: carson@carsonhendersonlawfirm.com

Billy J. Garrett Jr., Esquire

GARRETT LAW FIRM, PC
109 Oak Avenue
Greenwood South Carolina 29646
Telephone 864.229.8000
Facsimile 864.229.8001
Email: tgarretlaw@hotmail.com

ATTORNEYS FOR PETITIONERS

November 20, 2013

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM McCORMICK COUNTY

Court of General Sessions

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Case No. J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

S.C. Ct. App.Order filed October 21, 2013

State of South Carolina,

Respondent,

v.

Joe Ross Worley

Petitioner.

CERTIFICATE OF SERVICE

I, Beth Cogan, an employee of Desa Ballard, PA d/b/a Ballard Watson Weissenstein, do hereby certify that I have this date, served one (1) copy of the **Petition for Writ of Certiorari** in the above-captioned matter on the following people by placing the same document in the United States Mail, with sufficient first-class postage affixed and addressed as follows:

Mark Farthing
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Beth Cogan

Beth Cogan, Paralegal

November 20, 2013

Ballard
Watson Weissenstein
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169 | ph 803.796.9299 | fx 803.796.1066 | desaballard.com

November 20, 2013

Via U.S. Mail
Honorable Daniel E. Shearouse
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: *State of South Carolina v Joe Ross Worley*
Case No: 2012-210646

Dear Mr. Shearouse:

Please find enclosed an original and six copies of the Petition for a Writ of Certiorari. Also enclosed, please find one original and one copy of the Appendix. Please stamp the extra copy "filed" and return it in the enclosed self-addressed stamped envelope. Please do not hesitate to contact me with any questions. We greatly appreciate your assistance in this matter.

With warm personal regards, I am,

Sincerely yours,

Harvey M. Watson III
harvey@desaballard.com

c. Mark Farthing, Esquire (Petition only, via U.S. mail)
Honorable Jenny Abbott Kitchings, Court of Appeals (Petition only, via U.S. mail)