

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2009- 139166

RECEIVED

MAR 31 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

TRAVORIS MAURICE HURST,

Appellant.

**RETURN TO THE MOTION FOR A RECONSTRUCTION HEARING OR FOR THE
GRANTING OF A NEW TRIAL IF THE RECORD CANNOT BE RECONSTRUCTED**

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JL

The Respondent, through undersigned counsel, hereby makes a Return to the "MOTION FOR A RECONSTRUCTION HEARING OR FOR THE GRANTING OF A NEW TRIAL IF THE RECORD CANNOT BE RECONSTRUCTED" dated March 18, 2014. In the motion, the Appellant requests this Court to remand the matter to the Honorable J.C. Nicholson, trial judge of the August 2009 trial in Charleston County for the purpose of reconstructing the following portions of the trial which were not transcribed or included in the trial transcript provided to the South Carolina Office of Appellate Defense.¹

1. JURY INSTRUCTIONS.

a. The Movant's Exhibit A states in Tr. P. 270 in a transcriber's (Cheri Young

¹ Respondent notes that this is the second request to reconstruct the record in this case. On September 12, 2012, the Appellant requested a remand to reconstruct the sentencing portion of the record. That matter was resolved by affidavit of the Appellant on September 13, 2013.

of South Carolina Court Administration) note “. . .thereafter , the attorneys presented their closing statements and the Court gave the jury charge. No audio recording (blank CD) was provided to be transcribed.)” Tr p. 270, l. 18-21.

2. CLOSING ARGUMENTS OF THE PROSECUTION AND DEFENSE,

- a. According to the transcriber (Cheryl Young of South Carolina Court Administration) no audio recording of the closing arguments was available to be transcribed. See Tr. p. 270, l. 18-21. (Exhibits A and B to the Motion).

3. COMPLETE JURY SELECTION.

- a. Exhibit C and D to the Motion cites to Tr. p. 37 reflects an inquiry with a juror including inaudible and a transcriber’s note that “after many hours trying to decipher this audio CD, it is not possible to make an accurate record of the remaining jury selection.”

4. SELECTED QUESTIONS OF POTENTIAL JUROR AND RULING ON MOTION OF APPELLANT’S TRIAL TRANSCRIPT.

- a. Exhibit E to the motion reflects Transcript pages 35-37 including various “inaudible” responses from the counsel (Tr. p. 35, ll. 9, 10, 18, 23); potential juror number 39 (Tr. p. 36-37) and the trial court (Tr. p. 38)

Respondent submits that the record before reflects that the trial was handled by former court reporter Deborah Everett.²

² In his Petition, the Appellant asserts that an order to reconstruct missing and inaudible portions of the trial transcript held August 24-28, 2009 before the Honorable J.C. Nicholson is appropriate. The Respondents records reflect that the entire trial transcript was ordered by the South Carolina Office of Appellate defense on September 23, 2009 and on October 6, 2010 from Court Reporter Deborah Everett. On May 18, 2011, the Office of Appellate Defense ordered the transcript from Ms. Desiree Allen of the South Carolina Office of Court Administration. On September 14, 2010, Appellate Defense received the transcript for court reporter Young.

II.

Respondent concurs in the request to remand for reconstruction of the record. As Appellant recognizes, when a trial transcript has been lost or destroyed, the Court may remand to have the record reconstructed. *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002); *China v. Parrott* 251 S.C. 329, 162 S.E.2d 276 (1968); *Koon v. State*, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); *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).

III.

However, Respondent objects to the requested directive by Hurst that if any inaudible or missing portion of the record cannot be reconstructed, that a new trial is required. Respondent submits that it is **premature** to make that determination at this time. The issue concerns whether there can be a meaningful appellate review with the missing (or contested) portions of the record. See *State v. Neal*, 172 W.Va. 189, 304 S.E.2d 342, 345 (1983) (“Generally, the failure to report some part of the proceeding will not alone constitute reversible error[;] [s]ome identifiable error or prejudice must be shown by the defendant.”). “[B]efore a defendant can establish that he is entitled to a new trial on the basis of an inadequate reconstructed record, he must identify a specific appellate claim that this court would be unable to review effectively using the reconstructed record.” *Harris v. Comm'r of Corr.*, 40 Conn.App. 250, 671 A.2d 359, 363 (1996). For example, if it is resolved that no objections were made to the closing arguments or if it is resolved that no objections were made to the jury instructions, thus not preserving issues for a direct appeal, a new trial determination would be unnecessary. Similarly if it is resolved that jury selection was completed without objection to the release of juror 39, cited in Tr. p. 35-37, a new trial would not be warranted.

Where portions of stenographic notes are lost prior to transcription, it is appropriate for the judge to accept affidavits of counsel and the court reporter to determine what transpired. China v. Parrott, 251 S.C. 329, 333–34, 162 S.E.2d 276, 278 (1968). However, the reconstructed record must allow for meaningful appellate review. State v. Ladson, 373 S.C. 320, 321, 644 S.E.2d 271, 271 (Ct.App.2007). “A new trial is therefore appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review.” Id. at 325, 644 S.E.2d at 274 (citations and internal quotation marks omitted).

This case is not like Ladson where there was a complete absence of a trial record. As the Court stated in Ladson:

South Carolina jurisprudence recognizes the trial court's authority to set the record for appeal. In China v. Parrott, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968), our supreme court held that where a portion of the court reporter's notes were lost, the trial judge properly considered affidavits from counsel and the court reporter in reconstructing the record. See also Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) (recognizing a court's power to remand for a reconstruction hearing), overruled on other grounds by State v. Gentry, 363 S.C. 93, 105, 610 S.E.2d 494, 501 (2005); Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002) (finding that when a transcript has been lost or destroyed, an appellate court may remand to have the record reconstructed); Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct.App.1992) (holding trial court did not err in granting property owner's request to reconstruct the record of zoning proceeding where portions of original tape of hearing were incapable of being transcribed).

The authority of the trial court in South Carolina to reconstruct the record for appellate purposes aligns our state with the majority of jurisdictions that hold “the inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal.” Smith v. State, 291 Md. 125, 433 A.2d 1143, 1148 (1981); e.g., Lewis v. State, 354 Ark. 359, 123 S.W.3d 891, 893 (2003); Wilson v. State, 334 Md. 469, 639 A.2d 696, 699 (1994); State v. Deschon, 320 Mont. 1, 85 P.3d 756, 760 (2004); Lopez v. State, 105 Nev. 68, 769 P.2d 1276, 1280 (.1989); State v. Izaguirre, 272 N.J.Super. 51, 639 A.2d 343, 346 (App.Div.1994); People v. Shire, 23 A.D.3d 709, 803 N.Y.S.2d 309, 310 (N.Y.App.Div.2005); State v. Quick, 634 S.E.2d 915, 918 (N.C.Ct.App.2006); Dickerson v. Commonwealth, 36 Va.App. 8, 548 S.E.2d 230, 232–33 (2001).

Most jurisdictions require an appellant to demonstrate specific prejudice

flowing from an incomplete or reconstructed record. See, e.g., Lewis, 123 S.W.3d at 893 (“[I]t is the appellant's duty to demonstrate that prejudice results from the state of the record”); State v. Williams, 227 Conn. 101, 629 A.2d 402, 406 (1993) (holding appellant must show “specific prejudice that results from having to address his claims on appeal with the reconstructed record”); Jones v. State, 923 So.2d 486, 489 (Fla.2006) (noting appellant must point to prejudice resulting from missing portions of trial transcript); State v. Wright, 97 Idaho 229, 542 P.2d 63, 65 (1975) (holding appellant must demonstrate “specific prejudice” resulting from failure to reconstruct record); Simpson v. Commonwealth, 759 S.W.2d 224, 228 (Ky.1988) (holding a showing of “prejudicial error” in having to proceed using substitute transcript is required); Smith, 433 A.2d at 1148 (noting “defects must be of a prejudicial character”); Commonwealth v. Chatman, 10 Mass.App.Ct. 228, 406 N.E.2d 1037, 1040 (1980) (holding appellant must “come forward with articulable claims [by] which the reconstruction may be judged”); State v. Borden, 605 S.W.2d 88, 92 (Mo.1980) (holding appellant must demonstrate prejudice); State v. Dupris, 373 N.W.2d 446, 449 (S.D.1985) (holding appellant must show “specific error or prejudice” resulting from failure to record entire proceedings of trial); State v. Neal, 172 W.Va. 189, 304 S.E.2d 342, 345 (1983) (“Generally, the failure to report some part of the proceeding will not alone constitute reversible error[;] [s]ome identifiable error or prejudice must be shown by the defendant.”). “[B]efore a defendant can establish that he is entitled to a new trial on the basis of an inadequate reconstructed record, he must identify a specific appellate claim that this court would be unable to review effectively using the reconstructed record.” Harris v. Comm'r of Corr., 40 Conn.App. 250, 671 A.2d 359, 363 (1996). We believe our supreme court would follow a rule requiring the party challenging a reconstructed record on appeal to demonstrate prejudice flowing from an inadequate record.

We conclude from China and its progeny, combined with a review of the law of other jurisdictions, that our supreme court would require a reconstructed record on appeal to allow for “meaningful appellate review.” A new trial is therefore appropriate if the appellant establishes that “the incomplete nature of the transcript prevents the appellate court from conducting a ‘meaningful appellate review.’

Ladson, supra.

IV.

WHEREFORE, Respondent has no objection to an Order to Remand for Reconstruction of the August 2009 transcripts missing and/or inaudible portions. However, at this time an order for a new trial would be premature until the Appellant shows after reconstruction that he would be deprived of meaningful appellate review after identifying a specific appellate claim that this

court would be unable to review effectively using the reconstructed record, not the mere presence of an incomplete record.

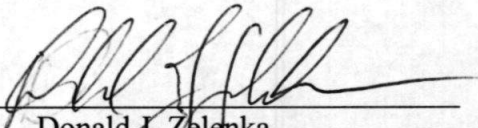
Respectfully Submitted,

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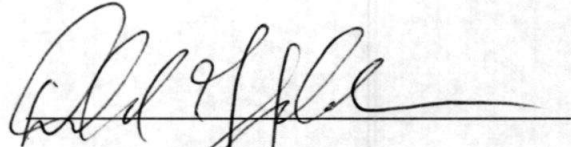
By: 
Donald J. Zelenka
ATTORNEYS FOR RESPONDENT

Handwritten initials: AW, JG

March 31, 2014

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the in the foregoing action by depositing copies in the United States Mail, postage prepaid, to Robert Dudek, Chief Appellant Defender, Division of Appellate Defense, P. O. Box 11589, Columbia, SC 29211 this 31st day of March, 2014.



DONALD J. ZELENKA

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SC Court of Appeals



ALAN WILSON
ATTORNEY GENERAL

March 31, 2014

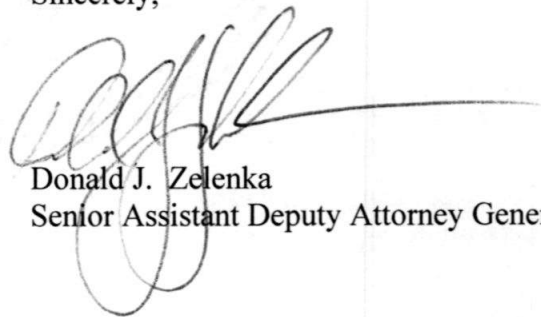
Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Travoris Maurice Hurst
Appellate Case No. 2009-139166

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Return to the Motion for a Reconstruction Hearing or for the Granting of a New Trial if the Record Cannot be Reconstructed, together with the certificate of service, in the above-referenced matter.

Sincerely,



Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/mv

cc: Robert M. Dudek, Esquire

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