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OCT 15 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

V.

TRAVORIS HURST,

APPELLANT.

APPELLATE CASE NO. 2009-139166

**Memorandum in Support of
Motion for a New Trial**

Appellant Travoris Hurst respectfully moves this Court to remand his case for a new trial since the circuit court found the record of his trial could not be reconstructed to allow for meaningful appellate review. See State v. Ladson, 373 S.C. 320, 325, 644 S.E.2d 271, 274 (Ct. App. 2007).

Procedural History

A Charleston County Grand Jury indicted Appellant at the May 5, 2008 term of General Sessions for the offense of murder. His case was called to trial on August 24, 2009 before the Honorable J.C. Nicholson, and a jury. Assistant Solicitors Gregory Voigt and Michael Nelson represented the state, and Juan Tolley represented Appellant. On August 28, 2009, the jury found Appellant guilty. Judge Nicholson sentenced him to thirty-nine years imprisonment.

A timely notice of appeal was subsequently filed on Appellant Hurst's behalf, and the Office of Appellate Defense undertook representation. The case was ultimately assigned to Chief Appellate Defender Robert M. Dudek. On March 18, 2014, because significant portions of the trial transcript were unable to be transcribed, Chief Appellate Defender Dudek filed a motion with this Court to remand the case to the circuit court for reconstruction of the record. This Court granted the motion by order filed May 14, 2014.

Subsequently, evidentiary hearings were held before Judge Nicholson on July 9, 2014, July 23, 2014, and August 14, 2014. Chief Appellate Defender Dudek and Appellate Defender Lara M. Caudy represented Appellant Hurst, and Assistant Attorney General Alphonso Simon, Jr. represented the state. By order dated August 19, 2014, Judge Nicholson found the record could not be reconstructed to allow for meaningful appellate review.

This motion for a new trial follows.

Relevant Facts

Upon receipt of the case, the Office of Appellate Defense requested Appellant's trial transcript from the court reporter. Undersigned counsel ultimately received an incomplete copy from court reporter Cheri L. Young. Specifically, the transcript was missing portions of voir dire, all of jury selection and any related motions, the majority of the cross-examination of state witness Ebony Walker Wilson, the colloquy regarding jury instructions, closing arguments, the court's charge to the jury, and the sentencing proceeding. Court reporter Young indicated on the certificate page that she had transcribed the trial from the records of Deborah Everette. She further stated, "I certify that I transcribed poor-quality audio CDs to produce this transcript to the very best of my ability."

As noted above, on March 18, 2014, undersigned counsel filed a motion with this Court to remand the case to the circuit court for reconstruction of the record and this Court granted the motion by order filed May 14, 2014.

At the August 14, 2014 reconstruction hearing, the trial court heard testimony from Juan Tolley, Ebony Walker Wilson, Appellant Hurst, Gregory Voigt, and Michael Nelson. In its August 19, 2014 order finding the record could not be reconstructed to allow meaning appellate review, the trial court stated, “It was apparent from the exhaustive direct and cross examination of these witnesses that they lacked a specific independent recollection of the precise nature of the missing portions of the trial transcript.” See Attached Order at p. 2.

Notably, it was established at the August 14, 2014 hearing through the testimony of these witnesses and a review of the partial transcript that a motion pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), was raised by defense counsel after jury selection and denied by the court. The precise nature of this Batson motion and the arguments raised by counsel is unknown as none of the parties involved had a specific independent recollection of the motion.

Also during this hearing, it was established from a review of the Clerk of Court’s file that defense counsel requested the court charge the jury on mere presence and that this request was denied.¹ Neither the trial court nor the parties involved could recall the specific arguments made by defense counsel in support of her request to charge mere presence nor the court’s reasoning for refusing to give the charge. However, it was undisputed that “a hand of one is the hand of all” accomplice liability instruction was given to the jury.

¹ The Clerk of Court found a written request from defense counsel to charge mere presence marked as a court’s exhibit in her original file. Judge Nicholson noted for the record that he would not mark a request to charge as an exhibit unless he refused to instruct the jury on the requested charge.

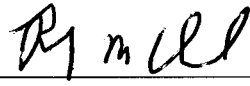
Argument

A new trial is proper “if the appellant establishes that ‘the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review.’” State v. Ladson, 373 S.C. at 325, 644 S.E.2d at 274 (citing In re D.W., 171 N.C.App. 496, 615 S.E.2d 90, 94 (2005) and State v. Chanze, 211 W.Va. 257, 565 S.E.2d 379, 382–83 (2002) (finding a criminal defendant is entitled to meaningful appellate review of his lower court proceedings, and if this is not possible from reconstructed record, a new trial is proper)).

As found by Judge Nicholson, the record before the court does not permit meaningful appellate review. See Ladson, 373 S.C. at 324, 644 S.E.2d at 273 (“South Carolina jurisprudence recognizes the trial court’s authority to set the record for appeal.”). It is undisputed that defense counsel made a motion pursuant to Batson v. Kentucky at the conclusion of jury selection that was denied by the judge. It is also undisputed that defense counsel requested the court charge the jury on mere presence, but the court refused. Because the precise nature of these motions and the specific arguments made by counsel is unknown, meaningful appellate review of these issues, and possibly other unidentified issues, is impossible, “especially in light of our issue preservation rules.” Ladson, 373 S.C. at 326, 644 S.E.2d at 274.

Moreover, failure to grant a new trial in this case would effectively foreclose any meaningful collateral challenge through post conviction relief or otherwise. See Ladson, 373 S.C. at 327, 644 S.E.2d at 274-275. Therefore, this Court should grant Appellant Hurst a new trial since the lower court, after thoroughly considering testimony and evidence on remand, has determined the record of this trial cannot be meaningfully reconstructed.

Respectfully submitted,



ROBERT M. DUDEK
Chief Appellate Defender

LARA M. CAUDY
Assistant Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Columbia, S. C. 29211-1589
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ATTORNEYS FOR APPELLANT

October 15, 2014

STATE OF SOUTH CAROLINA FILED IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON FOR THE NINTH JUDICIAL CIRCUIT

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Case No. 2008-GS-10-4301

State of South Carolina, Appellate Case No. 2009-139166

CLERK OF COURT

Respondent, BY *MH*

ORDER FINDING RECORD CANNOT BE RECONSTRUCTED

v.

Travis Maurice Hurst,

Appellant.

This matter comes before the Court by way of a motion to reconstruct the record. On May 14, 2014, the South Carolina Court of Appeals issued an order granting Travis Maurice Hurst's (hereinafter "Appellant Hurst" or "Appellant") motion to remand to the circuit court for reconstruction of the record. For the reasons that follow, it is the ruling of this Court that the record cannot be reconstructed to allow for meaningful appellate review. See State v. Ladson, 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007)

I. Procedural History

On May 5, 2008, Appellant Hurst was indicted by the Charleston County Grand Jury for the offense of murder. He proceeded to trial before this Court, and a jury on August 24, 2009. Assistant Solicitors Gregory Voigt and Michael Nelson represented the state, and Juan Tolley represented Appellant. On August 28, 2009, the jury found Appellant guilty, and this Court sentenced him to thirty-nine years imprisonment.

A timely notice of appeal was subsequently filed on Appellant Hurst's behalf, and the Office of Appellate Defense undertook representation. The case was ultimately assigned to Chief Appellate Defender Robert M. Dudek. On March 18, 2014, because significant portions of the trial transcript were unable to be transcribed, Chief Appellate Defender Dudek filed a motion

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CLERK OF COURT
[Signature]
CLERK

with the Court of Appeals to remand the case to the circuit court for reconstruction of the record. The Court of Appeals granted this motion by order filed May 14, 2014.

Subsequently, evidentiary hearings were held before this Court on July 9, 2014, July 23, 2014, and August 14, 2014. Chief Appellate Defender Dudek and Appellate Defender Lara M. Caudy represented Appellant Hurst, and Assistant Attorney General Alphonso Simon, Jr. represented the state.

II. Summary of the Evidence

On July 10, 2014, the Charleston County Clerk of Court issued a subpoena for Deborah Everett, the court reporter who recorded Appellant's trial, and for any and all recordings, tapes, or notes concerning the trial. At the July 23, 2014 hearing before this Court, Deborah Everett appeared and testified under oath that she had turned over all of her records pertaining to this case to Court Administration.

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This Court subsequently contacted counsel for Deborah Everett and requested Everett turn over the computer and/or hard drive she used when recording the trial in August 2009. As a result of this request, Everett turned over multiple disks and a flash drive containing her records. These disks were forwarded to court reporter Harriet Bennett, who attempted to transcribe the missing portions of the transcript. Some missing portions are unintelligible, while others are missing entirely. The missing portions include, but are not limited to, a cross examination, closing arguments and the jury charges.

At the August 14, 2014 hearing, this Court heard testimony from Juan Tolley, Ebony Walker Wilson, Appellant Hurst, Gregory Voigt, and Michael Nelson. It was apparent from the exhaustive direct and cross examination of these witnesses that they lacked a specific independent recollection of the precise nature of the missing portions of the trial transcript. Also admitted during this hearing were trial notes from Juan Tolley, Gregory Voigt, Michael Nelson, and the Clerk of Court. Additionally, affidavits of Ebony Walker Wilson and Appellant Hurst

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BY *[Signature]*
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were accepted by this Court.¹ See China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968) (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.)

Furthermore, during the August 14, 2014 hearing, the Clerk of Court located three court's exhibits from the trial in her original file. These exhibits were a request from defense counsel to charge mere presence and two notes from the jury sent out while they deliberated. This Court noted for the record that it would not mark a request to charge as an exhibit unless it refused to instruct the jury on the requested charge.

Neither this Court nor the parties involved can recall the specific arguments made by defense counsel in support of her request to charge mere presence nor this Court's reasoning for refusing to give the charge. Notably, no one even recalled whether a request to charge mere presence was made or whether mere presence was ultimately charged to the jury until the Clerk of Court found the court's exhibit near the end of the August 14, 2014 hearing.

Furthermore, it is apparent from the partial transcript and the notes of counsel that a motion pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), was raised by defense counsel after jury selection and denied by this Court. The precise nature of the Batson motion and arguments raised is unknown as none of the parties involved have a specific independent recollection of the motion.

III. Ruling

"South Carolina jurisprudence recognizes the trial court's authority to set the record for appeal." Ladson, 373 S.C. at 324, 644 S.E.2d at 273. This court finds that based on the significant time period that has lapsed since Appellant's trial in August 2009 and the noticeable lack of any independent recollection from the parties involved the record cannot be reconstructed

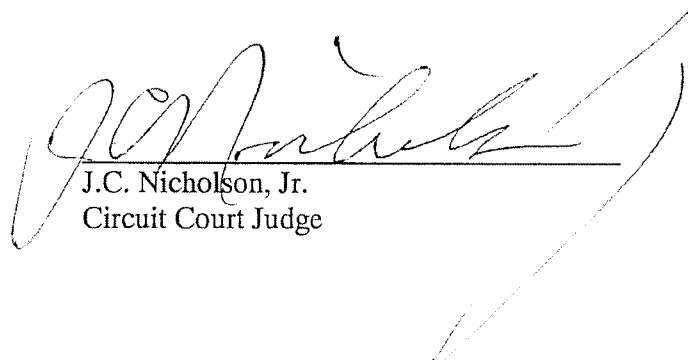
¹ The affidavit of Ebony Walker Wilson was redacted because it contained matters not relevant to reconstructing the record.

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JULIE A. ARMSTRONG (SEAL)
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to allow for meaningful appellate review, particularly in light of our issue preservation rules. Ladson, 373 S.C. at 325-326, 644 S.E.2d at 273-274. This is especially true given that there is a complete lack of a record concerning Appellant Hurst's motion pursuant to Batson v. Kentucky, 476 U.S. 79, and Appellant's Hurst's request to charge mere presence where it is undisputed a "hand of one is the hand of all" instruction was given to the jury.

Therefore, this Court holds the record cannot be reconstructed to allow for meaningful appellate review. See Adams v. H.R. Allen, Inc., 397 S.C. 652, 656-657, 726 S.E.2d 9, 12 (2012) (citing Ladson, 373 S.C. at 325, 644 S.E.2d at 274).

AND IT IS SO ORDERED.



J.C. Nicholson, Jr.
Circuit Court Judge

Charleston, South Carolina

This 19 day of August, 2014

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JULIE J. ARMSTRONG
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JULIE J. ARMSTRONG (SEAL)
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

J.C. Nicholson, Circuit Court Judge

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OCT 16 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

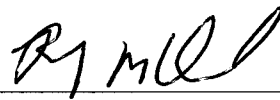
V.

TRAVORIS HURST,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Memorandum in Support of Motion for a New Trial in the above referenced case has been served upon Alphonso Simon, Jr., Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201 this 15th day of October, 2014.

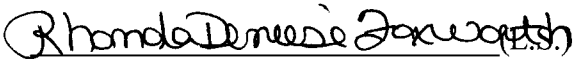


Robert M. Dudek
Chief Appellate Defender

Lara M. Caudy
Assistant Appellate Defender

ATTORNEYS FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of October, 2014.



Notary Public for South Carolina
My Commission Expires: October 17, 2021.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

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OCT 15 2014

SC Court of Appeals

October 15, 2014

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: The State v. Travoris Hurst, Appellate Case No. 2009-139166

Dear Ms. Kitchings:

Attached are an original and six copies of the memorandum in support of the granting of a new trial in the above-captioned case. We thank you in advance for the Court's consideration of our request that the Court grant a new trial since Judge Nicholson, as argued in the enclosed Memorandum, found after a lengthy remand reconstruction process that the record in this case cannot be meaningfully reconstructed. Please let me know if the Court desires any further information. Thank you.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/rdf

cc: Lara Caudy, Esquire
Alphonso Simon, Jr., Esquire
Donald J. Zelenka, Esquire