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S.C. Commission of Indigent Defense
Kathrine Haggard Hudgins
Appellate Division
P.O. Box 11589
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Date: 11.12.14

RECEIVED
NOV 17 2014
SC Court of Appeals

Re: 2012-GS-23-02699; State v. Hepburn

Dear Ms. Hudgins,

Greeting, I pray that you are well. This is in response to your correspondance from last month. In that correspondance you made mention of possibly wanting to do an Ander's brief, I agree that that is in option for you.

Ms. Hudgins, we have seemed to not be working together since after a correspondance, agreed in haste to your superiors, which I did make a public apology for, however, I feel that because of my knee-jurk reaction you have, from all appearances pulled away from my case. Granted, I am well aware that, as you have said, "the appeal process is very slow" and agreed I am aggressive and passionate when it comes to pursuing this endeavor, however, I have maintained my innocence from the beginning and GOD has given me the opportunity to be vindicated. Because of my ignorance in the initial proceedings, I was, like the majority of cases in this State... railroaded—, my fault for not knowing the law. Through this mistake of the court reporter, (things happen), I have been given a second chance. I have utilized this time and opportunity to educate myself, I am not a lawyer or attorney by any means of the words, (I have the utmost respect of who you are, your position and your record, I applaude you for your success), however, I am quite proud of the achievements during the course of time. The majority of inmates complain about mistakes made by counsel in their initial proceedings and do nothing about it. I do not feel that you are responsible for me or my situation, you are placed here to assist me, personally I would think you appreciate my outlook, where other inmates expect you to be a miracle worker and leave you responsible for everything that happens, I just am asking for help.

I may be a little lost, but, how can you have an appeal on the records of a previous proceeding... with only half a record? My underst-

anding is that a direct appeal is the proper jurisdiction for this complaint.

Just recently on Oct. 3, 2014 "The State" newspaper reported:
"In Richland County, a man serving extra time due to "lost trial records," "supports say is in adequate justice," "Those involved in the case realized the records were missing three(3) years ago while Reed (Applicant) was appealing." "(Appellate) He had been seeking a retrial since days after his conviction." Reed(Appellate) was represented by Betsy Franklin-Best and the Prosecutor was Dan Goldberg, the hearing judge was Honorable DeAndrea Benjamin, Circuit Judge. "Goldberg told Benjamin that problems with the court records were discovered in 2011 during the appeals pro--cess. The Clerk of Court's Office could not find a copy of Few's(Judge) 2009 order refusing Reed's request for a retrial. Goldberg said, that stalled the appeal." "The Trial Transcript could not be recreated for a retrial because court reporters generally destroys records after trial." "A retrial would be 'rife' with problems," Goldberg said, citing concerns that include the inability of defense lawyers to compare what witnesses said the first time with what they might testify to in a second trial. Respondant asked Benjamin to reject the agreement and order a new trial."

I do not have any further updates on the disposition of this case though, I'm sure you have heard of this case.

My understanding is, a direct appeal may be authorized, for example, when the case involves the constitutionality of a state law. Missing por--tions of a trial deprives a full meaningful review denying constitutional rights of due process and equal protection of law, 28 U.S.C.A. Const. Amend. 5 §1, 14§1; S.C. Const. Art. I, §14. Private Rights S.C. Const. Art. I, §3; State v. McIntire, 221 S.C. 504, 71 S.E. 2d 410 (1952). Stenographers is "fully responsible" for compiling notes. S.C. Code 1976, §14-1-10, 30. APA requires opportunity for a hearing §1-23-320(A), §1-23-320(E), §1-23-330(3). Record contested must include full transcript §1-23-320(G), S.C.A.C.R. Rule 207(a)(1), (5), (16); 210(c). I have sited and argued State v. Ladson, 373 S.C. 320, 325, 644 S.E. 2d 271, 273-74 (Ct. App. 2007), Deaton v. Leath, 279 S.C. 82, 84, 302 S.E. 2d 335-36 (1983), U.S. v. Huggins, 191 F. 3d 532, 537 (C.A. 4, 1999), Robertson v. Smith, WL 4484020 (*1) (C.A. 3, 2007), Coyler v Ryles, 827 F. 2d 315-16 (C.A. 8, 1987), Dyches v Martin, WL 1093133 (D.S.C., 2014), U.S. v Brown, 202 F. 3d 691, 694, 696 (C.A. 4, 2000), U.S. v Gillis, 773 F. 2d 544, 549 (C.A. 4, 1985), China v. Parrott, 251 S.C. 329, 333-34, 162 S.E. 2d 276, 278 (1968), Adams v. H.R. Allen Inc., 397 S.C. 652, 657, 726 S.E. 2d 9, 12, (2012), Evans v. Rushton, WL 5403226 (D.S.C., 2007).

It is my view and understanding of law that my complaint is proper and is ripe for direct appeal . . . is it not? I have shown beyond any doubt this complaint is fruitful. If, in your professional opinion, you disagree with my argument, I would enjoy clarity on your part. I app- -reciate your attention

Enclosed:

Supplement to support correspondence.

Respectfully Submitted,

s/ Sebastian J. Hepburn

cc:

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Sworn to and Subscribed before me
this 12th day of Nov., 2014

Notary Public for South Carolina
My Commission Exp. 4-27-2016

"In a direct appeal, the focus is generally upon the propriety of rulings made by the court in response to a parties motions or objections." Al-Shabazz v. State, 527 S.E. 2d 742, 747 (S.C., 2000). In PCR, the focus is usually on alleged errors made by prior counsel and other errors of law or fact that occured outside the record. The South Carolina Supreme Court said that "when asserting the erroneous admission of evidence, a violation of a constitutional right, or other errors in a proceeding, the [PCR] applicant generally must frame the issue as one of ineffective assistance of counsel". Id. This assertion is both overboard and underinclusive - not all errors appropiate for PCR constitute ineffective assistance of counsel (I.A.C.), nor must they be stated as such to be viable PCR claims - but it is correct that post-conviction relief is not a substitute for direct appeal. Cummings v. State, 260 S.E. 2d 187-88 (S.C., 1979). In other words, "errors which could have been reviewed on appeal may not be asserted for the first time, or reasserted in post-conviction proceedings" Id. - at least not in exactly the same way these errors were or could have been asserted on direct appeal.

Some examples will help clarify this point. South Carolina ascribes to a set of particularly onerous procedural default rules. See John H. Blume + Emily C. Paavola, "I object" is not enough: Tips for Criminal Defense Attorneys on Avoiding Procedural Default, South Carolina Law, Jan. 2009, at 35; John H. Blume + Pamela A. Wilkins, Death by Default: State Procedural Default Doctrine In Capital Cases, 50 S.C. L. Rev. 1 (1998) (discussing South Carolina's procedural default jurisprudence in detail). In particular, South Carolina requires strict adherence to the "contemporaneous objection" rule. See, e.g., State v. Vazquez, 613 S.E. 2d 359 (S.C., 2005). In State v. Holmes, 605 S.E. 2d 19 (S.C., 2004), rev.d on other grounds, 547 U.S. 319 (2006), a capital case, defense counsel objected to the Solicitor's closing argument in which the Solicitor took advantage of the trial judge's erroneous decision to exclude evidence that another man had actually committed the crime by repeating arguing that if Holmes had not committed the crime, "where is this raping, murdering, beating fellow that actually did this thing?" See Transcript of Record on Appeal at 4220, Holmes, 605 S.E. 2d 19 (No. 25886). The solicitor made similar arguments throughout his closing statement. Id. at 4210, 4212, 4216, 4223, 4228, 4231, 4263. After the solicitor had concluded his argument, defense counsel objected to these statements and moved for a mistrial. Id. at at 4236-4267. On direct appeal, however, the South Carolina Supreme Court held defense counsel's objection was procedurally barred because, although defense counsel did bring the issue to the trial court's attention, he did not do so "contemporaneously" with the solicitor's statement. Holmes, 605 S.E. 2d at 25. Because these claims could have been reviewed on direct appeal if they would have been properly preserved, Holmes is unable to raise them in the same manner in post-conviction.

In Wilson v. State, 559 S.E. 2d 581 (S.C., 2002), he did not Knowingly and intelligently waive his rights to a direct appeal from his criminal conviction. Id. at, 582-83. The court explained:

A defendant has the procedural right to "one fair bite at the apple". This is, every defendant has a right to file a direct appeal and one PCR application. In this case, Wilson has not had "one bite at the apple" since he has not received either a direct appeal from his conviction or a PCR hearing.

The "one fair bite" policy would be frustrated if the one year statute of limitations for PCR claims applied where the applicant was denied his direct appeal due to I.A.C. and then was denied his right to a PCR application because of the one year statute of limitation. Id.

Evans v. Rushton, WL. 540326 (D.S.C., 2007)

III. A. Petitioner timely appealed his conviction and an appeal was perfected on his behalf by Tara S. Taggart, Esquire, S.C. Office of Appellate Defense, who moved for a reconstruction hearing, or in the alternative, for a new trial, on the ground that portions of the trial transcript were not transcribed due to noise on the court reporter's tape.

Petitioner was denied due process of law under the 28 U.S.C.A. Const. Amend. 14 and is entitled to a new trial because a proper transcript of the trial was not preserved for appellate review and the reconstruction hearing was inadequate.

On direct appeal in this matter, Petitioner was granted a reconstruction hearing in an attempted to reconstruct the portions of the trial transcript that were missing to ensure that Petitioner would receive an effective appellate review of his trial. Many of the relevant allegations that Petitioner relied on for relief in this matter are missing from the trial transcript, and therefore could not be raised on direct appeal.

The reconstruction hearing did not help this matter any, because the trial judge, the solicitor and trial counsel's memories of the trial were vague at best.

Petitioner argues he is entitled to a new trial because a proper transcript of his trial was not preserved for meaningful review.

Due process requires that a record of 'sufficient completeness' be provided for appellate review of the errors raised by a criminal defendant. See, Draper v. Washington, 372 U.S. 487, 496-98 (1963). However, where a portion of the record is unavailable because a transcript is lost or is otherwise missing, the inability of the State to provide a full transcript of the trial proceedings does not entitle defendant/applicant a new trial per se. Id. Rather, he must demonstrate that despite a good faith effort, it is impossible to reconstruct the missing portions of the record and that such precludes effective appellate review of the issues. Id.

1) proper transcript of the trial was not preserved for appellate review and the reconstruction hearing was inadequate;
2) Petitioner's position is that a remand for a further reconstruction of the trial transcript is like beating a dead horse, nothing could be accomplished in another reconstruction hearing because the trial judge, the solicitor, and trial counsel's memories would be worst than the first hearing;
3) Petitioner believes he should receive a new trial and a proper transcript of that trial should be preserved for appellate review, if necessary;
4) This matter 'resulted' in a decision that was based on an unreasonal determination of the facts in light of the evidence presented in the state court (Reconstruction Hearing) proceeding.

The South Carolina Constitution provides that in procedures before administrative agencies: "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and on opportunity to be heard"... S.C. Const. Art. I, § 22 (2009 + 2011).

State v. Ladson, 373 S.C. 320, 644 S.E. 2d 271 (S.C. App, 2007)
Adams v. H.R. Allen Inc., 397 S.C. 652, 657, 726 S.E. 2d 9, 12 (S.C. App, 2012)
State v. Haygood, S.E. 2d, WL 2930457 (#17) (S.C. App., 2014)

The South Carolina Supreme Court explains:
"Procedural due process requirements are not technical; no particular form of procedure is necessary. The United States Supreme Court has held, however, that a minimum certain elements must be present. These include (1) adequate notice, (2) adequate opportunity for a hearing, (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Adams v. H.R. Allen, Inc., 397 S.C. 652, 657, 726 S.E. 2d 9 (S.C. App, 2012); McBride v. School District of Greenville County, WL 8541576 (S.C. App., 2013).
"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 determined what transpired." China v. Parrott, 251 S.C. 329, 333-34, 162 S.E. 2d 274, 278 (1968). However, "the reconstruction record must allow for a meaningful appellate review. State v. Ladson, 373 S.C. 320-21, 644 S.E. 2d 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.

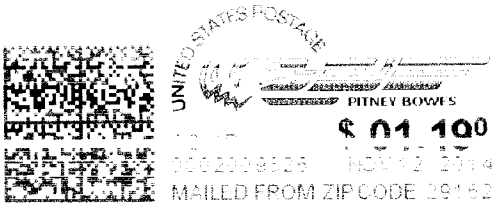
Cited in Bailey v. McCall, WL. 786837 (D.S.C., 2013), "If it is impossible to adequately reconstruct the record to allow for meaningful appellate review, the general rule has been to grant a new trial." State v. Ladson, 373 S.C. 320, 644 S.E. 2d 271 (Ct. App., 2007)(timely appeal, but court reporter could not produce transcript due to a failure of the recording equipment). Where however, the inability to adequately reconstruct the record is due to some fault or unreasonable delay on the part of the appellant, the appeal has instead been dismissed. Cf. State v. Serrette, 375 S.C. 650, 654, S.E. 2d 554 (Ct. App., 2007)(tape of trial destroyed during the delay in trial)". Parson v. State, WL. 11748260 (S.C., 2011).
State v. Haygood, WL 2430457 (S.C. App. 2014), "First, he could have objected to the accuracy of the transcripts." See Rule 607(i), S.C.A.C.R. Second, pursuant to China v. Parrott, 251 S.C. 329, 162 S.E. 2d 276 (1956), "Plaintiff could have asked the appellate court to remand the case for a re-construction of the record. If lack of an accurate transcript precl-uded the appellate court from conducting a meaningful appellate review, he could have requested a new trial." State v Ladson, 373 S.C. 320, 644 S.E. 2d 271, 273-74 (S.C. Ct. App., 2007); Barnes v Thueme, WL 5781711 (D.S.C., 2013).
Ladson 373, at 328, 644 S.E. 2d, at 275, (reversing and remanding for a new trial where the record lacked the completeness and reliability necessary for this court to engage in meaningful appellate review").

Date: 11.12.14

Sebastian J. Hepburn

Sworn to and Subscribed before me
this 12th day of Nov., 2014

Notary Public for South Carolina
My Commission Exp. 6-29-2016



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