

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

DESHAWN LEE POWELL,

APPELLANT

APPELLATE CASE NO. 2012-212140

PRO-SE BRIEF OF APPELLANT

DeShawn Lee Powell #350880
Lieber Correctional Institution WD-197
P.O. Box 205
Ridgeville, SC 29472

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS _____ 1

TABLE OF AUTHORITIES _____ 2

STATEMENT OF ISSUE ON APPEAL _____ 3

STATEMENT OF THE CASE _____ 4

ARGUMENT'S
Missing Records, incomplete transcript, Abuse of Discretion,
Statement of Jackson V. Denno, was not recorded at trial. Judge errors
when allowing allegation of prior homicide in which Appellant was not convicted
abuse of discretion. Judge err in Denying in Directed verdict. But objections
was Presented on Record. Both _____ 5-16

CONCLUSION _____ 17

TABLE OF AUTHORITIES

Cases

U.S. VS. Cronin, 466. US 648. 104 S. Ct, 2039	1-16
State V. Ladson, 373 SC. 320, 644 S.E.2d 271 (APP 2007)	5-10
State V. Gravin, S.E.2d 2014 WL 6721427	1-16
State V. Alexander, 303 SC 377, 401 S.E.2d 146 (SC 1991)	1-16
State V. Burdette, 335 SC 34, 515 S.E.2d 525 (SC 1999)	1-16
State V. Bullenger, 322 SC 196, 199, 470 S.E.2d 851, 853 (1996)	13, 15,
State V. Broadnax, 401 SC. 238, 736 S.E.2d 688 (SC 2013)	11,
28 U.S.C.A. § 2254(d)(2)	3
Rule 609(a)(2)	3, 11,
State V. Jerry Gerald Serrette; Opinion No. 4321, filed December 4, 2007, Shearouse Advance Sheet No. 42.	6,
China V. Parrott; 251 S.C. 329, 162 S.E.2d 276 (1978)	6,
Deantan V. Leath; 279 SC. 82, 84, 302 S.E.2d 335, 336 (1983)	6,
Fed. Rules Evid. Rule 609(a)(1), 28 U.S.C.A.	11,
State V. Wright; 97 Idaho 229, 542 P.2d 63, 65 (1975)	10,
State V. Dupris, 373 N.W.2d 446, 449 (S.D. 1985)	10,
Simpson V. Commonwealth; 759 S.W.2d 224, 228 (Ky. 1988)	
Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968)	6,
State V. Grippon 327 SC 79, 489 S.E.2d 462 (1997)	
28 U.S.C.A. § 2254(d)(2)	3,
Rule 44. S.C.R.P	9,
Abuse of Discretion	12, 13, 15, 16,
U.S.C.A. Const. Amend 14	14, 16
EXHIBITS : Letters from SCCID Division of Appellate Defense, Kathrine H. Hudgins A	
②	

STATEMENT OF ISSUE ON APPEAL

"Is the Appellant now entitled to a new trial because proper transcript of the trial was not presented for Appellate review?
Was the Appellate Denied his Due process to Effective Assistance of Counsel when Counsel went forward with Briefing without complete transcript of Appellate Record?
28 U.S.C.A. § 2254(d)(2).

Abuse of Discretion:

An adjudicator's failure to exercise sound, reasonable, and legal decision-making. 2. An Appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, or illegal.

See Discretion:

A public official's power or right to act in certain circumstances according to personal judgment and conscience - as termed discretionary power.

"Did the trial court abuse its discretion in admitting allegation of prior Homicide in which Appellant was not convicted?"

"Did the trial court err in admitting Allegation of Homicide for impeachment purposes pursuant to Rule 609(a)(2)?"

Rule 609. Impeachment by Evidence of Conviction of Crime of Conviction of Crime: (A)(2) Evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment. For the purposes of this rule, a conviction includes a conviction resulting from a trial or any type of plea, including a plea of nolo contendere or a plea pursuant to North Carolina vs. Alford, 400 U.S. 25 (1970).

STATEMENT OF THE CASE

In February of 2011, the Orangeburg County Grand Jury indicted Powell of murder, indictment #2011-GS-38-0015. On May 15, 2012, Powell proceeded to jury trial before the Honorable Edgar W. Dickson. Peggy Hinds and Douglas Mellard represented Powell at trial. Donald Sorenson and Harrison Bell prosecuted the case. The jury found Powell guilty of the lesser included offense of Voluntary Manslaughter. Judge Dickson sentenced Powell to thirty (30) years in prison. A timely notice of intent to appeal was served and filed. This appeal follows.

ARGUMENT'S

State Courts deny petitioner due process and a fair and full hearing, access to the courts within the meaning of the U.S. Constitution, by omitting Petitioner's testimony, Objections and assertions of Constitutional rights within petitioner trial transcript from the record of appeal thereby obstructing Petitioner from fully meeting and developing his burden of proof on Appeal, thereby will a obstructing Petitioner from being able to fully develop his Brief to the South Carolina Court of Appeals.

'The facts assert as to this claim is that respondent has been and is engaging in intentional and obstructive manipulation of the record of Appeal of this case by omitting Petitioner's properly submitted testimony, Objections and asserted Constitutional right of the May 15th - 17th, 2012 Complete Trial transcript thereby impairing Petitioner from fully and fairly litigating his claims and hindering his right to access the courts to air his Constitutional grievances. The petitioner Powell is entitled to a full and fair review of his Constitutional claims, which cannot be meaningfully perfected and determined by this court without the complete trial transcript of petitioner's properly submitted Jury Selection, testimony, Jackson v. Denno, hearing, Objections and asserted Constitutional right of the May 15th - 17th, 2012 trial. However I (we) do not find in the transcript of records. Petitioner prays this court order respondent to produce the complete trial transcript of the May 15th - 17th, 2012 trial, or order respondent to declare whether or not production of the transcript is available). Alternately, Petitioner prays this court

remand his case to have the record reconstructed and allow the Circuit Court to determine whether reconstruction is possible. The South Carolina Court of Appeals has the authority to remand for reconstruction of the record, And can demand for a New trial, Should it be necessary, pursuant to China V. Parrott; 251 S.C. 329, 162 SE 2d 276 (1978) and, Deaton V. Leath; 279 S.C. 82, 84, 302 SE 2d 335, 336 (1983) and, State V. Jerry Gerald Serrette; Opinion No. 4321, filed December 4, 2007, Shearouse Advance Sheet No. 42.

Because Petitioner did nothing willful to disrupt reception and retention of the transcript of the trial transcript hearing, Petitioner is entitled to product of these transcripts. Without production of these transcript the Petitioner's due Process right Secured by the S.C. Constitution and U.S. Constitution are Violated.

Ground Petitioner was denied due Process of Law Under the 14th Amendment of the U.S. Constitution and is entitled to a new trial because [a] proper transcript of the trial was not preserved for Appellate review and [the]. Supporting Facts: Are the "EXHIBITS", letters from SCCID Division of Appellate Defense, Kathrine H. Hudgins, Facts that supports Petitioner's allegations in Ground is Obvious in the transcript of the trial on direct Appeal in this matter is missing to ensure that petitioner would receive an effective Appellate review of his trial. (App. 132-154). 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.

Issues that related to a Jury Selection, a Jackson V. Denno hearing is [sic] missing from the trial transcript and can not be raised on direct Appeal, missing also are the Pretrial matters.

Its been over 2 years reconstruction hearing cant help this matter and, because the Court Reporter said, "according to the Log Sheet of the court reporter, Lieutenant James Shumpert testified at this time." However, there is no audio recording for the testimony, of the Jackson V. Denno hearing for Lieutenant James Shumpert (Tr. P171, Line 4-10). Also my trial Counsel, Peggy Hinds, Advised my Appellate Lawyer Kathrine H. Hudjins that she did not make any Objections to the Selection of the Jury in my case. "But how can Ms. Hind, my trial Counsel, Show that she didnt, or did made any Objections at trial when the trial transcript is incomplete? So is it her words agains my word? I dont need to liy she Objected to (3) Jurors, onewas a family member of the Victim, and Someone was a transfer on the Jurors stand that person have family members who work in Law enforcement, and his wife is related to Victim family." The Court Reporter notes that the tape contained nothing further in regard to this case is what my Appeal Counsel said in her Letter's to me. They are now my EXHIBITS, from SCCID Division of Appellate Defense Kathrine H. Hudjins, Facts that Support my Claims. They also show how Ms. Hudjins ask the Courts to put my case in abeyance

Cause she realized the Jury Selection of trial transcript is missing. She states "I understand your frustration about the delay in receiving the transcript of Jury Selection. I too am frustrated by the delay." She states she contacted South Carolina Court Administration on August 28, 2013, December 18, 2013, March 6, 2014, and April 28, 2014. She states "I will continue to contact Court Administration until we receive the transcript."

She states "Again, I can not advise you about the issues I will raise on direct appeal until I have read your Complete transcript. Hopefully, we will receive the requested Jury Selection transcript soon and I can begin work on your case."

That letter was dated on April 29, 2014. She wrote me back on May 15, 2014, saying and sending me a copy of the transcript of the Jury Selection, and she ask the court to take my case out of abeyance and hopefully will be able to review your complete transcript and submit an initial brief within the next 90-60 days.

I called her to let her know the Jury Selection is still incomplete. She wrote me back and said "I received your letter dated September 22, 2014, asking about the Jury Selection transcript. As you are well aware, there was a substantial delay in receiving the request Jury Selection transcript. She states "when we finally received the requested transcript, it included Jury qualification, but not Jury Selection. She states Jury Selection was not needed for the direct appeal cause there were no objection to the Jury Selection. How Do She know, with out the records?"

Petitioner believes he should receive a new trial and a proper transcript of that trial should be preserved for Appellate review if necessary.

Issues that related to a Jackson V. Denno hearing is [sic] missing from the trial transcript and cannot be raised on direct Appeal, missing also are the Jury Selection, all pretrial matters.

At the Voir dire, Jury Selection, How can I find any (Strikes) made by my Lawyer or the prosecution? or see if the prosecution permitted to exercise "back strikes"? Or if it was any (issue of discriminatory)?

Rule 44 S.C.R.P

Proof of Official Record: foreign Law (b) Lack of Record

A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record is admissible as evidence that the records contain no such record or entry. (c) Other Proof, This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

The Court reporter States in the transcript that She Did not record Lieutenant James Shumpert [Testimony] at the Jackson V. Denno. (Tr. p171, Line 4-10) She States her Log Sheet of the court reporter, Lieutenant James Shumpert [Testified] at this time. However, there is no audio recording for the testimony.

"A new trial is appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review."

Because of the testimony absence of a transcript, Mr. Powell moved this court to reverse the conviction and sentences and for a new trial. Based on the, that reconstructing the record from scratch, after such a substantial delay, would be an uphill struggle.

I believes these concessions enlighten Mr. Powell and us to the specific issues to address on Appeal.

State V. Wright, 97 Idaho 229, 542 P.2d 63, 65 (1975)

(Holding appellant must demonstrate "specific prejudice" resulting from failure to reconstruct record). See EXHIBIT^S Letters from SCCID Division of Appellate Defense, Kathrine H. Hudgins

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) See EXHIBITS Letters from SCCID Division of Appellate Defense, Kathrine H. Hudgins.

When Jackson V. Denno hearing was over, Lieutenant James Shumpert was put back on the stand to testified, The Judge States, his Notes, he wrote down, that James Shumpert said, Mr. Powell said he did not know what he was talking about and he said he was not there (Tr. p181, Line 1-7)

Powell, was Cross examination by the Solicitor Mr. Sorenson. Powell was ask, do you -- you're aware of your rights, right? Powell says "yes, s.r." (Tr. p178, Line 2-6) So the Solicitor, goes And ask Powell, "you've been through this before, right? (is that correct, you've had police advise you of your rights in the past, is that correct? Powell States, "Minor Stops in the Streets. (Tr. p178, Line 75) So then the Solicitor goes and ask Powell about a Allegation of a homicide (Tr. p178, Line 11-14) Mr. Mellard Object to the Solicitor asking about a homicide that Powell was never convicted of, It was a Homicide Allegation. The trial Judge Let it Slide in as Powell being asked was he mirandized. (Tr. p178, Line 11-24)

Did the trial court abuse its discretion in admitting allegation of prior homicide in which appellant was not convicted?

Did the trial court err in admitting Allegation of Homicid for impeachment purposes pursuant to Rule 609(a)(2)?
State v. Broadnax 401 S.C. 238, 736 S.E. 2d 688 (2013)

Erroneous admission of (Another Homicide) defendant Prior Homicide Allegations without balancing test was highly Prejudicial and was not harmless, as prior Allegations were for Identical offense, giving rise to likelihood of high degree of danger of unfair prejudice. Fed. Rules Evid. Rule 609(a)(1), 28 U.S.C.A.

Erroneous admission of Alleged Homicide with out balancing test was highly prejudicial and was not harmless, as prior Allegations were for Identical offense, in wich, applleta was not found guilty of, giving rise to likelihood of high degree of danger of unfair prejudice. Fed. Rules Evid. Rule 609(a)(1), 28 U.S.C.A.

Ms. Hinds, Move for a directed Verdict. (Tr. p 328, Line 16-18)
She States " Basically Mr. Powell is Charged with Killing another person maliciously. The testimony has been that Mr. Riley basically died from Stabbing wounds to his head and Chest. There's absolutely no evidence connecting Mr. Powell to this Crime. We believe that the, that even holding, putting it in the best light for the State, that they can not, they can put Mr. Powell there earlier at some point in that early morning hours. But they can not place him there's no eye witness showing that he committed the Stabbing. There's nothing DNA wise Linking him to the knife. (Tr. p 328, Line 19 - p. 329, Line 4)
The testimony was that he and Mr. Riley had an argument and there was some fists exchanged, some blows exchanged. (Tr. p 329, Line 5-6)
That testimony was made By D-shop, Darrell Jones (Tr. p 83, Line 16 - p 87, Line 1-19)
But we do not feel as though they've met their burden of Proof, and we'd ask for a directed Verdict. (Tr. p 329, Line 7-8)

The trial Judge States, " All Right, All Right. Ms. Hinds, I have reviewed the testimony cause I recall it. To Me, The most damaging things is the fact that's he's there. He was Obviously engaged in a fight. They did find a knife at his home, and it does have the DNA of the Victim on it. So, I think, just that alone, along with some other Circumstantial evidence, is enough, When Viewed in the light most favorable to the State, the evidence, the evidence could Lead the jury to Convict him of the Crime. So, I will deny your motion for a directed Verdict. (Tr. p 330, Line 20 - p 331, Line 1-8)

" Did the trial Judge Abuse of Discretion, towards the Motion for a directed Verdict, " By Emphasizing the need for Careful

reasoning, the Special (Circumstantial Evidence) Charge "forecloses [the] danger... That the trier of facts may Leap Logical (gaps) in the Proof offered and draw unwarranted conclusions based on probabilities of low degree."

("The [trial] court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty) (Suspicion implies a belief or opinion as to guilty based upon facts or circumstances which do not amount to proof).

State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996)

However a trial [court] is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis).

"The [trial] judge is concerned with the existence or non-existence of evidence, not with its weight; and although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.

Issue "The knife is found at my house, with the victim's blood on it, as Lieutenant James Shumpert is leaving out my house. How did he miss it be for going in my house? But I was not at home! and the weapon don't have any prints on it. So whose knife is it?" Lastly Powell contends the trial court erred in denying his motion for a directed verdict, claiming the state failed to

prove the corpus delicti of a murder and that there was no evidence he caused Mr. Riley's death. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty." Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

U.S.C.A. Const. Amend. 14

Mr. Mellard requested ~~the~~ motion for directed Verdict be renewed all motions that the (jury) needs to be made including our motion, move for a new trial. (Tr. p. 429, Line 22-p. 430, Line 1-3) It's our position there is no evidence to support the conviction for Voluntary Manslaughter. The Court: Continue with denying the motion for a directed Verdict, also motion for a new trial is denying. Under the facts, factual situation in this case it was proper. At least he felt that, it was proper. (Tr. p. 430, Line 4-11) He states there was clear testimony that they had been fighting that it was proper to charge Voluntary manslaughter. He also states certainly testimony to the, to, which could lead a reasonable person to believe that the defendant was guilty of Voluntary manslaughter. (Tr. p. 430, Line 11-15) But he states "so, I'm going to deny your request for a new trial. But I'll note your objections to (both) of my rulings so it can be preserved on the record which is the next thing you were gonna do I presume. (Tr. p. 430, Line 16-22)

"Did the trial judge Abuse of Discretion, towards the motion for a directed Verdict, "By emphasizing the need for careful reasoning, The Special (Circumstantial Evidence) Charge "Forecloses [The] danger... That the trier of facts may Leap Logical (gaps) in the Proof offered and draw unwarranted conclusions based on probabilities of low degree"

("The trial court should not refuse to grant the directed Verdict motion when the Evidence merely raises a suspicion that the accused is guilty) (suspicion implies a belief or opinion as to guilty based upon facts or circumstances which do not amount to proof).

State v. Bullenger, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996)

However a trial [court] is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.)

[The] trial judge is concerned with the existence or non-existence of evidence, not with its weight; and although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.

Issue "The knife is found at my house, with the victim's blood on it; as Lieutenant James Shupert is leaving out my house; How did he miss it before going in my house? But I was not at home! And the weapon doesn't have any prints on it. So whose knife is it?

"Lastly, Powell contends the trial court erred in denying his motion for a directed verdict, claiming the State failed to prove the corpus delicti of a murder and that there was no evidence he caused Mr. Riley's death.

It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

U.S.C.A. Const. Amend 14

CONCLUSION

Based on the above argument, Appellant conviction and Sentence should be reversed and the case remanded for a new trial.

The outside inference based upon missing court records where no counsel could have given effective assistance.

This is a case in which the surrounding circumstances make it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiring into actual performance at appeal.

I ask this conviction and sentence should be reversed and the case remanded for a new trial. However, (I)(we), do not find in the trial transcript of record before (us) any jury selection, pre-trial hearing also missing part of Jackson v. Dem. (Respectfully Submitted,)

Deshawn Powell

Deshawn Powell

Appellate

Appellant Pro-se Brief of Appeal

This 7th day of January, 2015.

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