

STATE OF SOUTH CAROLINA
COURT OF APPEALS

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OCT 20 2015
SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
Daneil D. Hall, Presiding Judge

Appellate Case No. 2015-001004

Antonio Gordon,

Appellant,

v.

State of South Carolina,

Respondent.

MOTION TO RECONSTRUCT THE RECORD

Appellant filed a statutory habeas corpus dated December 5, 2005, filed January 3, 2006. See Attachment (a) (habeas corpus petition filed by Gordon). The York County Clerk of Court filed Appellant's habeas petition as a post-conviction relief application. See Attachment (b) (Letter from Clerk of Court). The Respondent filed their Return dated 4/18/06. See Attachment (c) (Return to habeas petition). Without providing Appellant with an opportunity to reply to the proposed dismissal pursuant to S.C. Code Ann §17-27-70(b) (supp. 2006) Titled "Court procedure on receipt of application", Honorable John C. Hayes, III, dated April 30, 2007, filed June 1, 2007 issued an order dismissing Appellant's habeas/post-conviction relief petition. See Attachment (d) (Order dismissing habeas/post-conviction relief petition). See En1

En1 This Order did not inform Appellant he could have appealed the Court's decision.

is a nullity void ab initio, and that Appellant was deprived appellate review on judge Couch order as a result of ineffective assistance of counsel in violation of Austin. See Attachment (j) (Gordon's **second** Rule 60(b)(5)-Austin Belated Appeal filed March 9, 2015)

Judge Hayes issued an order dated March 4, 2015, filed March 9, 2015 and received by Appellant March 19, 2015, which made finding of fact and conclusion of law, that he was not a conflict of interest, appellant attempting to raise the same juvenile jurisdiction issue previously raised and unappealed a second time and Appellant's Austin review must fail because Appellant was granted relief he asked for in his motion which resulted in no prejudice to the Appellant. See Attachment (k) (Order dated March 4, 2015, filed March 9, 2015 dismissing Gordon's Rule 60(b) motion without prejudice).

After receipt of Judge Hayes Order filed March 9, 2015 Appellant within ten (10) days filed a S.C.R. Civ. P 59(e) motion dated March 23, 2015, filed March 25, 2015, asking Judge Hayes to reconsider, alter and amend his judgment to find he was a conflict of interest, Appellant juvenile jurisdiction claims was two (2) separate claims in which one had been raised previously and the other had not, Jurisdiction could be raised at any time, Appellant's Austin review should be granted because judge Couch in his order filed February 6, 2008, granted Appellant relief for which he did not ask for and because judge Couch considered Gordon's 60(b) under Rule 59(e) analysis, thereby did prejudice Gordon, and counsel rendered ineffective assistance in failing to file a Notice of Appeal at Gordon's request. See Attachment (L) (Appellant's first 59(e) motion filed March 25, 2015).

Judge Hayes recused his self and judge **Daneil D. Hall** presided over the case and made specific fact finding and conclusion of law replacing judge Hayes original order filed March 9, 2015. In Judge Hall order he found Appellant's Austin review and juvenile jurisdiction claims were untimely, Appellant's 59(e) motion was untimely per 59(e) and because Appellant's issues are untimely Appellant's motions must be denied. See Attachment (m) (Order denying Rule 59(e) motion filed April 20, 2015). See Fn4

Appellant attempted to file a "second" Rule 59(e) motion asking judge

fn4 Judge Hayes found Gordon raised the same juvenile jurisdiction claim in his initial habeas but judge Hall in his Order recognized Gordon raised two (2) separate juvenile jurisdiction issues in his Order denying relief but found they was untimely.

Hall to reconsider, alter and amend his judgment to find Appellant's Austin review was not untimely pursuant to Odom v. State, 523 S.E.2d 753 (1999) and find Appellant's second juvenile jurisdiction issue that the unconstitutionality of S.C. Code Ann § 20-7-6605(1)(supp.1998) Titled Define "[C]hild" statutory deprived York County General Sessions and York County Grand Jury of its jurisdiction over Gordon's person, was not previously raised in the initial habeas petition, jurisdiction could be raised at anytime, and Appellant's Rule 59(e) motion was not untimely because Appellant received Judge Hayes Order filed march 9, 2015 on March 19, 2015. See Attachment (n)(Gordon's second 59(e) motion). The Clerk of Court personnel returned Appellant's **second** Rule 59(e) motion with a letter stating Appellant previously filed the same type of motion and an order has been issued and there is a order in place restricting Appellant from any future filing. See Attachment (o)(Letter from Clerk of Court returning Appellant's second 59(e) motion).

This court instructed Appellant he needed to inform the Court the status of the transcript or his appeal would be dismissed. The Appellant wrote to the Court of Administration requesting the transcript of the evidentiary hearing held in January of 2008. The Court of Administration wrote Appellant indicating their office does not have the transcript. See Attachment (p)(letter from Court of Administration), with Attachment's (1) and (2)(letters wrote to the Court of Administration).

Appellant currently have a 42 U.S.C. § 1983 Civil Rights Action pending in the Federal District Court concerning David Hamilton returning Appellant's **second** 59(e) motion based upon an order that restricted Gordon from filing any future post-conviction relief applications **only**. See Attachment (q)(1983 Civil Rights action filed against Clerk of Court), with Attachment (3)(Order Restricting Gordon from filing any future post-conviction relief applications (4951)).

ARGUMENT

This Court has the authority to remand for reconstruction of the record pursuant to China v. Parrot, 251 S.C. 329, 162 S.E.2d 276 (1968). In State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (2007) the court held, Serrette's own actions are the reason a transcript of the proceedings below was not available; this is not a situation where the court reporter's equipment malfunction at trial leading to a loss of the trial transcript. See Deaton v. Leath, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983). We can divine no reason why Serrette is entitled to a reconstruction of the record when the destruction of the transcript resulted from his willful decision to remain a fugitive.

In the instant case the Clerk of Court records indicates Appellant was not in a hearing January of 2008. See Attachment (h) and (I). As a result of ineffective assistant of counsel (Burnette, III), failing to appeal judge Couch order filed February 6, 2008 at Gordon's request, this error in fact deprived Appellant of knowing the Clerk of Court records were inadequate and incomplete, which deprived the Appellant appellate review pursuant to S.C. Code Ann § 17-27-100 (supp. 2008) because the record on appeal would not be sufficient. Bonaparte v. Floyd, 291 S.C. 427, 444, 354 S.E.2d 40, 50 (Ct. App. 1987) (Stating the appellant bears the burden of providing a record on appeal sufficient for intelligent review; Rule 210(h), SCACR ("The appellate court will not consider any fact which does not appear in the record on appeal"); Bryson v. Bryson, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) (affirming because appellant failed to provide a sufficient record").

As a result of the clerk of court inadequate and incomplete records and ineffective assistant of counsel (Burnette, III), the transcript of Gordon's evidentiary hearing from his 60(b) motion in January 2008 is unavailable. Appellant has been consistently pursuing his rights in both federal and state court since the evidentiary hearing, therefore, the matter should be remanded to reconstruct the record and or have a new hearing where reconstructing the record will not provide the Appellate court with

sufficient record on a appeal. See State v. Ladson, 644 S.E.2d 271,273 (Ct.App.2007)(The reconstructed record must allow for meaningful appellate review).

Assuming arguendo the record from Appellant's January 2008 evidentiary hearing on his Rule 60(b) motion cannot be reconstructed, Appellant asserts he provided the requisite evidentiary material to the court of appeals. There is a sufficient record before it to permit meaningful appellate review and make a decision on the merits. See Quail Hill, 387 S.C. at 234, 692 S.E.2d at 505,; Hamilton v. Greyhound Lines E, 316 S.E.2d 368 (1984)(stating the appealing party has the burden of providing a sufficient record such that the appellate court can make an intelligent review). See Fn5 Therefore, pursuant to Woodson and Rule 210(h), SCACR this appeal should move forward and be decided on the merits. Sweat v. Crawford, 356 S.E.2d 147, 149 (ct.App.1987)(finding omissions from the record did not prejudice appellant because the evidence included in the record sufficiently supported the findings of fact made by the referee).

finally, it is respectfully asked that the court issue an order holding briefing in abeyance until all motions are adjudicated.

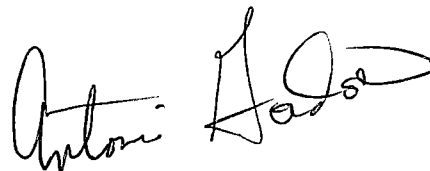
fn5 In the instant case, what's before this court is Gordon's February 6, 2008 order issued by judge Couch, Appellant's SCRPC 60(b)(5)-Austin v. State, supra, Belated Appeal, filed March 9, 2015, Judge Hayes Order dated March 4, 2015, filed March 9, 2015, Appellant's Rule 59(e) motion dated March 23, 2015, filed March 25, 2015 and judge Hall Order filed April 20, 2015 denying 59(e) and 60(b)(b)-Austin Belated Appeal. All of the facts are included in the record on appeal before the court of appeals, Thus, the hearing transcript are not necessary for purpose of appellate review. see Woodson v. DLI Properties, LLC, 753 S.E.2d 432 Fn9 (2014).

CONCLUSION

It is respectfully asked that this court remand for reconstruction of the record and or allow Appellant's Appeal to proceed forward where there is enough material in the record such that the appellate court can make an intelligent review.

Respectfully Submitted
Antonio Gordon, #259798
Kershaw C.I. Oak B 46
4848 Goldmine Hwy
Kershaw, South Carolina 29067

This 19 day of October, 2015

A handwritten signature in cursive script, appearing to read "Antonio Gordon". The signature is written in dark ink and is positioned to the right of the typed name and address.