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RECEIVED
JUL 06 2018
S.C. SUPREME COURT

July 6, 2018

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: Moses Frasier v. State of South Carolina
Appellate Case No. 2018-000739

Dear Mr. Shearouse:

Enclosed is the original and six copies of the Motion to Remand to Reconstruct the Record of Petitioner's Post-Conviction Relief Hearing in the above referenced case.

Thank you for your assistance in this matter.

Sincerely,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

LMC/meb

Enclosure

cc: Megan Harrigan Jameson, Esquire
Moses Frasier, #317940

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

Maite Murphy, Circuit Court Judge

MOSES FRASIER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED
JUL 06 2018
S.C. SUPREME COURT

APPELLATE CASE NO. 2018-000739

MOTION TO REMAND TO RECONSTRUCT THE RECORD OF PETITIONER'S POST-CONVICTION RELIEF HEARING

Pursuant to Rule 240 of the South Carolina Appellate Court Rules (SCACR), undersigned counsel requests an order requiring the parties to reconstruct the record of Petitioner's post-conviction relief (PCR) hearing held on January 9, 2012 in Charleston County before the Honorable R. Markley Dennis.

In accordance with Rule 240(c)(3), SCACR, Petitioner submits the following documents to support this motion: Application for PCR filed February 27, 2009 (Exhibit A); Amended Application for PCR filed November 5, 2009 (Exhibit B); Order of Dismissal filed February 22, 2012 (Exhibit C); Application for PCR filed January 25, 2016 (Exhibit D); Transcript of Hearing

Held on February 1, 2018 (Exhibit E); Order Granting Austin Appeal filed April 18, 2018 (Exhibit F); Transcript Request dated June 21, 2018 (Exhibit G); Letter from Desiree Allen dated June 28, 2018 (Exhibit H).

Procedural History

A Charleston County Grand Jury indicted Petitioner on June 12, 2006 for the offense of murder. His case was called to trial on October 2, 2006 before the Honorable James C. Williams, and a jury. Assistant Solicitors Nathan Williams and Kim Steele represented the state, and Beattie Butler and Jason Mikell represented Petitioner. On October 5, 2006, the jury found Petitioner guilty of the lesser included offense of voluntary manslaughter. He was sentenced to thirty years imprisonment.

The Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion filed January 15, 2009. State v. Frasier, 2009-UP-052 (S.C. Ct. App. filed January 15, 2009).

On February 27, 2009, Petitioner filed an application for PCR. Exhibit A. He filed an amended application on November 5, 2009. Exhibit B. An evidentiary hearing was convened on January 9, 2012 before the Honorable R. Markley Dennis, Jr. Exhibit C. Assistant Attorney General Matthew J. Friedman represented the state, and Jeffrey Yungman represented Petitioner. Exhibit C. By order filed February 22, 2012, Judge Dennis denied Petitioner relief. Exhibit C.

On January 25, 2016, Petitioner filed a second application for PCR seeking a belated appeal from the order of dismissal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) after Counsel Yungman failed to notify Petitioner that the order of dismissal had been filed, provide Petitioner with a copy of the order, or file a notice of appeal on Petitioner's behalf. Exhibit D. An evidentiary hearing was convened on February 1, 2018 before the Honorable

Maite Murphy. Assistant Attorney General Rasheeda Cleveland represented the state, and James Falk represented Petitioner. Exhibit E. By order filed April 18, 2018, Judge Murphy granted Petitioner a belated appeal pursuant to Austin. Exhibit F.

Missing Transcript

Upon being assigned to represent Petitioner, undersigned counsel began to gather the documents needed to compile the appendix. Counsel discovered that the transcript of Petitioner's first PCR hearing held on January 9, 2012 did not exist and had never been transcribed.[1] Consequently, on June 21, 2018, counsel requested the transcript from Court Administration. Exhibit G. By letter dated June 28, 2018, Desiree Allen, the court reporter manager for Court Administration, informed counsel that the transcript could not be transcribed. Exhibit H. Ms. Allen explained that Court Administration, in maintaining court reporter records, strictly adheres to Rule 607, SCACR, which requires records be retained for only five years.[2] Exhibit H. Because the hearing took place before June 2013, the records to prepare the transcript are no longer available. Exhibit H.

Reconstruction of the Record

The transcript of the evidentiary hearing held on January 9, 2012 is necessary for meaningful appellate review of Petitioner's post-conviction relief case because it contains the evidence presented to support Petitioner's claims that he is entitled to relief. Given the standard

[1] According to the Public Index, Petitioner's first PCR hearing was originally scheduled to take place on January 27, 2011. However, a continuance was presumably granted. The hearing was ultimately held on January 9, 2012. Exhibit C. During the evidentiary hearing held on February 1, 2018 before Judge Murphy, Assistant Attorney General Rasheeda Cleveland incorrectly told Judge Murphy that the first hearing was held on January 27, 2011. Exhibit E. This incorrect date also appears in the order granting Petitioner a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Exhibit F.

[2] Deborah Garrison, the court reporter present at Petitioner's first PCR hearing, is now retired.

of review on appeal in post-conviction relief cases, which requires a determination of whether any evidence in the record supports the PCR court's findings of fact, meaningful appellate review of the lower court's determinations is impossible without this transcript. See Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Additionally, it is part of the lower court record and must be included in the appendix pursuant with Rule 243(f)(1), SCACR. As a result, Petitioner respectfully requests this Court to remand his case to reconstruct the record of the evidentiary hearing held on January 9, 2012.

The trial court has the authority to set the record for appeal. State v. Ladson, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007). "[T]he inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal." Id. (internal citations omitted). "Where a trial transcript has been lost or destroyed, a court may remand to have the record reconstructed." Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); see also Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002) (holding that when a transcript has been lost or destroyed, an appellate court may remand to have the record reconstructed); China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Ladson, 373 S.C. at 325, 644 S.E.2d at 273-274; Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992).

In order for the record to be reconstructed, it must be done in a manner that provides for meaningful appellate review and complies with the constitutional guarantees of procedural due process. Ladson, 373 S.C. at 325, 644 S.E.2d at 273-274; see also China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012); Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 418 S.E.2d 319 (Ct. App. 1992). The Court of Appeals held "the party challenging a reconstructed record on appeal [must]

demonstrate prejudice flowing from an inadequate record." Ladson, 373 S.C. at 325, 644 S.E.2d at 273. "A new trial is therefore appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting meaningful appellate review." Id. at 325, 644 S.E.2d at 274 (internal quotations omitted).

In China v. Parrott, 251 S.C. at 332, 162 S.E.2d at 277, "portions of the stenographic notes of the trial proceedings were lost before they were transcribed by the court reporter." The appeal concerned the form of a withdrawal for punitive damages, specifically, whether the withdrawal operated to withdraw the issue of the defendant's recklessness from the case. Id. The missing portions of the transcript were relevant to this issue. Id. The case was remanded to the trial judge "to settle the case for appeal." Id. at 333, 251 S.E.2d at 277-278.

In State v. Ladson, the defendant, who was convicted of first degree burglary after a three day trial, learned the court reporter could not produce the transcript. Ladson, 373 S.C. at 321, 644 S.E.2d at 271. Ladson moved for a new trial. Id. The state moved for reconstruction. The Court of Appeals remanded the case for reconstruction. Id. Ladson's reconstruction hearing occurred more than a year after the trial. Id. The Court explained "the passage of time clearly dimmed the recall of the participants." Id. at 325, 644 S.E.2d at 274. Reviewing the transcript of the reconstruction hearing, the court noted, "It was clear from the outset of this hearing that reconstructing the record from scratch, after such a substantial delay, would be an uphill struggle." Id. at 321-322, 644 S.E.2d at 271-272. The court concluded meaningful appellate review was not possible where the testimony of the majority of the witnesses was in summary fashion, the information provided was conclusory, the parties had forgotten about one witness altogether, and there was a dispute whether the defendant testified. Id. at 322, 644 S.E.2d at 272.

After the reconstruction hearing, the court was "left with a bare bones summary of the evidence (with more remaining unknown than known) from a lengthy multi-day and fact-intensive trial that resulted in a non-parolable twenty-five year person term." Id. at 327, 644 S.E.2d at 274. The record before the court contained only "a few gratuitous references to generic motions and objections" without any information concerning "the context of the motions, the specific nature of the motions, and whether the challenged evidence was cumulative to other unchallenged evidence." Id. The court refused to speculate. Id. In concluding the record was insufficient for meaningful appellate review, the court also noted the record "would effectively foreclose any collateral challenge through post-conviction relief or otherwise." Id. at 327, 644 S.E.2d at 275. Thus, the court concluded, Ladson had demonstrated "clear prejudice." Id.

In Deaton v. Leath, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983), the defendant's convictions were set aside and a new trial had where the court reporter's equipment malfunctioned and there was no transcript of the trial court proceedings from which to base an appeal. In State v. Serrette, 375 S.C. 650, 652-653, 654 S.E.2d 554, 555 (Ct. App. 2007), citing Deaton, the Court of Appeals denied a request for reconstruction where the reason for the lack of transcript was due to the defendant's absence for a ten year period, which the court explained was "not a situation where the court reporter's equipment malfunctioned at trial leading to a loss of the trial transcript."

Here, meaningful appellate review of the lower court's determinations is not possible without the transcript of the evidentiary hearing. The standard of review on appeal in a PCR case requires a determination of whether any evidence in the record supports the PCR court's findings of fact. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Moreover, the inability of the court reporter to produce the transcript is through no fault of Petitioner. See

Exhibit F. Therefore, Petitioner seeks reconstruction of the record to permit meaningful appellate review of the PCR court's order denying relief.

WHEREFORE, Petitioner respectfully requests this Court to remand this case to reconstruct the record of his post-conviction relief evidentiary hearing held on January 9, 2012 in order to perfect his appeal. While this motion is pending, Petitioner respectfully requests this Court to hold the timelines for filing his petition for writ of certiorari and appendix in abeyance.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

Attorney for Petitioner

This 6th day of July, 2018.