


THE STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
Quincy McCants, #318280)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
Case No.: 2009-CP-32-04236
Appellate Case No.: 2015-002142
Indictment No.: 2005-GS-32-4674

ORDER

This matter came before this Court pursuant to a December 1, 2016 order from the South Carolina Supreme Court remanding this case to reconstruct the record of the evidentiary hearing in the matter of *Quincy McCants v. State of South Carolina*, a Post-Conviction Relief (PCR) action (2009-CP-32-04236). The reconstruction hearing was held and the individuals present were, the Applicant Quincy McCants who was represented by Taylor D. Gilliam, attorney with the South Carolina Commission on Indigent Defense and the State who was represented by Senior Assistant Attorney General Ed Salter and Assistant Attorney Generals, W. Joseph Maye and Samuel Bailey.


At this hearing, the Court heard testimony from six witnesses. Walt Whitmire, the attorney who handled the PCR from the Attorney General's Office, Stanley Myers, co-counsel on Applicant's trial counsel team, Jonathan Harvey, co-counsel on Applicant's trial counsel team, Hazella Baylor, a forensic technician employed with the South Carolina Law Enforcement Division (SLED) who testified at the original PCR hearing, Tricia Blanchette, Applicant's PCR attorney, and the Applicant Mr. McCants.

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Procedural History

Mr. Quincy McCants (hereinafter referred to as "Applicant" or "Mr. McCants") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. During its December 2005 term of court, the Lexington County Grand Jury indicted Applicant for Armed Robbery (2005-GS-32-4674). He retained attorney Jonathan Harvey to represent him in the case. During the course of the representation, Mr. Harvey requested to be relieved as counsel due to disagreements in the presentation of the case with Applicant. The motion to be relieved as counsel was denied due to the Solicitor's desire to proceed with the upcoming trial date. Attorney Stanley Myers accepted court appointment as additional co-counsel for Mr. McCants to address the concerns expressed by Mr. Harvey.


Mr. McCants proceeded to a jury trial on his charge on October 16 and 17, 2006, before the Honorable Judge R. Knox McMahon. At the conclusion of the jury trial, Mr. McCants was found guilty of Armed Robbery, as indicted, and was then sentenced by Judge McMahon to twenty-two (22) years in prison. Applicant sought direct appeal of his sentence via an *Anders* brief filed by attorney Wanda Carter, but the S.C. Court of Appeals affirmed the conviction in an unpublished opinion dated May 6, 2009. Applicant then filed his Post-Conviction Relief Application on September 18, 2009. Assistant Attorney General West Lee represented the State and filed its Return in February 23, 2010; Assistant Attorney General Walt Whitmire took over representation for the State sometime thereafter and represented the State at the evidentiary hearing. Attorney Tricia Blanchette served as PCR counsel and filed an Amended Application in November 2012.

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On August 13, 2013, an evidentiary hearing was held before this Court wherein Mr. McCants as Applicant asserted his claims for relief. At the hearing, Mr. McCants, attorney Jonathan Harvey, attorney Stanley Myers, and SLED forensic technician Hazella Baylor testified. Following the conclusion of testimony, this Court took the matter under advisement. The parties were later informed of the Court's decision and this Court requested that Assistant Attorney General Walt Whitmire draft a proposed Order of Dismissal for this Court's consideration. A twenty-seven page proposed Order was emailed by Attorney Whitmire to this Court and to opposing counsel, Tricia Blanchette, on October 6, 2014. This Court reviewed the proposed Order of Dismissal finding that Applicant had failed to meet his burden under *Strickland*, made a number of minor handwritten changes and corrections, initialed those changes, and signed the Order of Dismissal on November 24, 2014. The Order was filed on February 11, 2015.

Attorney Blanchette filed a Rule 59(e) Motion to Reconsider on behalf of Applicant on February 24, 2015. The Motion to Reconsider provided the procedural posture, restated the thirteen (13) allegations asserted by the Amended PCR Application filed on August 13, 2013, and waived issue #10. Citing *Marlar v. State*, Ms. Blanchette argued that a PCR Court must make specific findings of fact as to each presented issue, and requested that in reconsideration of this matter, the Court:

Ensure that specific findings of fact and conclusions of law are entered on each issue listed in the Amendment and presented at the hearing. The standing Order of Dismissal refers to "several allegations" in different portions of the findings but fails to specifically identify those and rule on each issue raised at the evidentiary hearing. Furthermore, Applicant submits that the evidence offered and testimony of each witness is not properly addressed. Therefore, Applicant would further request that this Court obtain and review the evidentiary hearing transcript due to the passage of time since the evidentiary hearing to ensure the accuracy and completeness of the Order.

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That Motion was denied by written Order on September 7, 2015. Attorney Blanchette then filed a Notice of Appeal on behalf of Applicant so that the denial of Post-Conviction Relief could be appealed to the South Carolina Supreme Court.

In efforts to file Mr. McCants' Petition for Writ of Certiorari, the parties learned that the transcript of the PCR evidentiary hearing could not be produced by the court reporter. At that time, the South Carolina Supreme Court remanded the case with instructions to either reconstruct the record of the evidentiary hearing or grant a new trial.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony of each original witness from the original PCR evidentiary hearing, and has additionally heard the testimony of the attorneys who presented the PCR case in August of 2013. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law concerning the reconstruction of Applicant's August 13, 2013, PCR evidentiary hearing.

Discretion in determining how to proceed with a reconstruction of an unavailable transcript lies with the trial court. *Adams v. H.R. Allen, Inc.*, 397 S.C. 652, 658, 726 S.E.2d 9, 13 (Ct. App. 2012). This Court acknowledges that a reconstruction hearing will never be so effective as to provide a verbatim recreation of every question and response elicited during the original hearing. When a transcript has been lost or destroyed, the Court may remand to have the record reconstructed so as to allow for meaningful appellate review. *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002); *China v. Parrott*, 251 S.C. 329, 162 S.E.2d 276 (1968); *Dolive v. J.E.E. Developers, Inc.*, 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992); *State v. Ladson*, 373

S.C. 320, 325, 644 S.E.2d 271, 273-274 (Ct. App. 2007). A reconstructed record on appeal should allow for “meaningful appellate review.” *State v. Ladson, supra*. A new trial is therefore appropriate if the appellant establishes that “the incomplete nature of the transcript prevents the appellate courts from conducting a ‘meaningful appellate review.’” *Id.* at 325, 644 S.E.2d at 274. Accordingly, if meaningful appellate review of Petitioner’s post-conviction relief court proceedings is not possible given the unobtainable nature of the hearing transcript, a new PCR is the proper remedy. *Ladson*, 373 S.C. at 325-326, 644 S.E.2d at 274. The South Carolina Supreme Court Order granting remand of this matter provided that if the undersigned “determines reconstruction is not possible, it shall immediately notify this Court and the parties of this determination”.

This Court has reviewed the available record and admitted exhibits. This Court concludes that despite the outstanding efforts of all parties involved in attempting to reconstruct the record, it is unable to be reconstructed with sufficient clarity for the Court to decide whether the elements the in Applicant’s claim met the two components outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Summary of Testimonies

Walt Whitmire –


Attorney Whitmire was employed with the Attorney General’s office at the time of the PCR hearing. He stated during the reconstruction hearing that his recollection of the PCR hearing was very limited. While he recalled one of the main issues of the hearing, he could not provide any information that would give clarity to the record meeting the standard for ensuring that the hearing met the Constitutional requirements. Further, Mr. Whitmire reviewed documents prior to the reconstruction hearing but still had limited memory of the PCR hearing because he lacked

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access to his notes. Due to this, he did not want to speculate on any details of the hearing beyond the fact that he prepared the proposed Order of Dismissal and that it contained errors. The information provided by Attorney Whitmire does not give this Court enough information to support a finding that the record has been sufficiently reconstructed.

Jonathan Harvey –

Attorney Jonathan Harvey was co-counsel for the Applicant's trial counsel team. He was originally the only counsel that the Applicant had. Mr. Harvey requested to be relieved as counsel and his request was denied by the Court. Just like Mr. Whitmire, his records no longer contained a physical file of the trial phase of the Applicant's case. However, he did bring certain materials that he had stored electronically in an effort to assist in the reconstruction of the record. Mr. Harvey recalled discussing at the PCR hearing what efforts he took to represent Mr. McCants and how these efforts were documented by correspondence to his client. Mr. Harvey recalled his trial strategy and identified the issues that were important in the trial. However, Mr. Harvey agreed that despite his best efforts, he would have been unable to get on the stand and "verbatim give out every statement that he made during the original PCR hearing". Regarding exhibits, he admitted that he would not be surprised if more exhibits existed in the record maintained by the Clerk of Court than were listed in the Order of Dismissal. It is unclear who authenticated the existing exhibits and what the resulting testimony might have been because there is no transcript. Therefore, the information provided by Attorney Harvey does not give this Court enough information to support a finding that the record has been sufficiently reconstructed.

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Stanley Myers –

Attorney Stanley Myers was co-counsel for the Applicant's trial counsel team. He was appointed as co-counsel to Mr. Harvey to assist with the Applicant's defense. Mr. Myers, like Mr. Harvey and Mr. Whitmire, also did not have access to the PCR file while preparing for the reconstruction hearing. Mr. Myers did not take notes. He remembered answering questions from Tricia Blanchette regarding scope of representation and trial strategy. He could not remember the specific questions that she asked during the PCR hearing. While he did recall his scope of representation and trial strategy in general, there was no testimony to indicate what process was actually applied during the criminal trial. Mr. Myers provided testimony on communications between the Applicant, co-counsel, and himself. He also provided testimony on the responsibilities for each attorney. He did not provide any testimony on whether any objections were made, what specific questions were asked, or any other information that would allow this Court to determine whether the trial counsel's actions in the trial phase warranted a new trial or not. Therefore, the information provided by Attorney Myers does not give this Court enough information to support a finding that the record has been sufficiently reconstructed.

Tricia Blanchette –

Attorney Tricia Blanchette represented the Applicant during his PCR hearing. As was the case with Whitmire, Harvey, and Myers, Ms. Blanchette no longer had a paper file. She also did not have an independent recollection of the PCR hearing. Ms. Blanchette's testimony was about her issues with the order of dismissal. She felt that the order failed to address thirteen issues that were contained in the amended application. She was unable to recall what she raised at the PCR hearing. She testified that she did not have "specific verbatim facts that she could tell the Court she disagreed with" because she did not have the benefit of a transcript. Therefore, the information

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provided by Attorney Blanchette does not give this Court enough information to support a finding that the record has been sufficiently reconstructed.

Hazella Baylor –

Hazella Baylor, a forensic technician employed by SLED, testified that she found irregularities with the order of dismissal. Specifically, she never testified she does not know whether or not a visual inspection was performed by a field agent therefore, she would not have testified that SLED agents “did not conduct a visual inspection of the recovered print in this case”. She also indicated that she only searched one fingerprint database as SLED has access only to one. While there are other fingerprint databases that exist that other law enforcement agencies utilize, she does not remember discussing those variations at the PCR hearing. Therefore, the information provided by Ms. Baylor does not give this Court enough information to support a finding that the record has been sufficiently reconstructed.

Quincy McCants –

Quincy McCants is the Applicant and was the last to testify at the Reconstruction hearing. He was given an opportunity to review the exhibits admitted during the PCR hearing. When asked about various evidence he said that he doesn't remember exactly what was mentioned with at least one of the exhibits. He also did not recall whether Ms. Blanchette brought up certain issues or elicited certain testimony at the PCR hearing that he felt may have been important to his case. He could not recall if Attorney Myers declined to present evidence. Therefore, the information provided by Applicant Quincy McCants does not give this Court enough information to support a finding that the record has been sufficiently reconstructed.

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Conclusion

This Court finds that based on the testimony of all of the individuals involved with the PCR hearing, there is not enough information available to successfully reconstruct the PCR hearing. Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a convicted Defendant has to meet two burdens of proof in order to require a reversal of a conviction. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Even though the Court signed an order of dismissal stating that the Applicant failed to meet the two burdens of proof, there is no transcript available for appellate review. Since there is no transcript for appellate review, the Applicant's right to an appeal is hindered. The appellate court can review only the court record and the briefs filed by the appellant and the appellee. This has been made all but impossible due to the loss of the court record. Despite the attempts to reconstruct the PCR hearing, the record of the reconstruction hearing does not allow for a meaningful appellate review. Since the applicant wished to appeal his PCR outcome, "the burden is placed upon him to furnish a sufficient record for the Court's review" *Bonaparte v. Floyd*, 291 S.C. 427, 354 S.E.2d 40, 86 A.L.R. 4th 103 (1987). Without a meaningful record or a sufficient record, an appellate court cannot consider any issues raised by the Applicant. An insufficient record denies the Applicant his *one chance* in PCR court and it effects his right to due process, "An individual under PCR effectively is granted *one chance* to argue for relief and must do so within a year of his final appeal" (emphasis added) *Wade v. State*, 348 S.C. 255, 559 S.E.2d 843 (2002).

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The attorneys involved in attempting to reconstruct the PCR hearing should be commended for their work and their effort in assisting in this process. However, the decision of the Court is that the reconstruction of the record is not possible and that a new PCR hearing should be held. Accordingly,

IT IS THEREFORE ORDERED that reconstruction of the PCR hearing has not produced a transcript suitable for meaningful appellate review.

AND IT IS FURTHER ORDERED that the Applicant be, and hereby is, granted a new PCR trial.

AND IT IS SO ORDERED.

December 14, 2018
Orangeburg, South Carolina



Edgar W. Dickson
Presiding Judge