

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Certiorari to Lexington County

Edgar W. Dickson, Circuit Court Judge

QUINCY ANDRE MCCANTS,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2015-002142

MOTION TO VACATE THE ORDER OF DISMISSAL
AND REMAND FOR A NEW
POST-CONVICTION RELIEF HEARING

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, undersigned counsel requests an order setting aside the Order of Dismissal signed by Judge Edgar W. Dickson. By way of a written Order dated December 14, 2018, Judge Dickson found “there is not enough information available to successfully reconstruct the PCR hearing.”

In accordance with Rule 240(c), SCACR, Counsel submits the following document to support his motion: Judge Dickson’s Order dated December 14, 2018 (Exhibit #1). As part of Petitioner’s prior Motion to Hold Appeal in Abeyance and Motion to Remand for Reconstruction of Post-Conviction Relief Hearing or the Granting of a New Trial filed on September 21, 2016,

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PETITIONER

this Court has on file two exhibits: A) a letter from Court Reporter Harriet Bennett indicating that the PCR transcript could not be produced and B) the Order of Dismissal which Petitioner is asking this Court to vacate.

Procedural History

During the December 2005 term of court, a Lexington County grand jury indicted Petitioner for armed robbery (2005-GS-32-4674). This case proceeded to trial before the Honorable R. Knox McMahan on October 16, 2006. Petitioner was represented by Jonathan Harvey and Stanley Myers. Petitioner's trial lasted two days. The jury found him guilty as indicted. Judge McMahan sentenced Petitioner to twenty-two years of imprisonment.

Petitioner filed a timely notice of appeal. The South Carolina Court of Appeals affirmed his sentence in an unpublished opinion. State v. McCants, 2009-UP-194 (S.C. Ct. App. filed May 6, 2009).

Petitioner filed an application for post-conviction relief in August 2009. The State's Return was filed in February 2010. Petitioner filed an amended application for PCR on or about November 5, 2012.

An evidentiary hearing was held before the Honorable Edgar W. Dickson on August 13, 2013. Petitioner was represented by Tricia Blanchette. Respondent was represented by Walt Whitmire of the Office of the Attorney General. Following the evidentiary hearing, an Order of Dismissal was issued on November 24, 2014 and filed on or about February 5, 2015.

Petitioner filed a Motion for Rehearing or to Alter/Amend the Order of Dismissal on or about February 27, 2015. An order denying the motion was signed on September 7, 2015 and filed on or about September 23, 2015.

A notice of appeal was filed on or about October 16, 2015.

The undersigned's office first requested the transcript from the August 13, 2013 hearing on January 3, 2016. Following receipt of the letter from Harriet Bennett, the undersigned moved for a remand before this Court.

This Court issued an Order on December 1, 2016 which remanded this matter to reconstruct the record of the evidentiary hearing. The Order indicated that "[i]f Judge Dickson determines reconstruction is not possible, he shall immediately notify this Court and the parties of that determination."

A reconstruction hearing was held on November 8, 2017. The court heard from six witnesses: Walt Whitmire, Stanley Myers, Jonathan Harvey, Hazella Baylor, Tricia Blanchette, and Quincy McCants.

The order that found reconstruction not possible specifically cited each witness's testimony and concluded, with respect to each individual's testimony, that the information provided did not give the PCR court enough information to support a finding that the record had been sufficiently reconstructed. This Order was signed on December 14, 2018.

Discussion

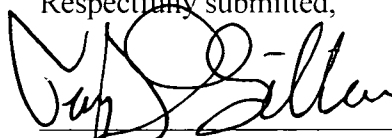
When a trial transcript has been lost or destroyed, the Court may vacate the conviction and sentence and remand for a new trial if meaningful appellate review is not possible. See Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002); Deaton v. Leath, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983); 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). In Deaton, supra, 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 in the case from which to base an appeal. Citing Deaton, this Court denied a request for reconstruction in State v. Serrette, 375 S.C. 650, 652-653, 654 S.E.2d 554, 555 (Ct. App. 2007) where the reason for the lack of transcript was due to the defendant's absence for a ten-year period, which this Court explained was "not a situation where the court reporter's equipment malfunctioned at trial leading to a loss of the trial transcript." Petitioner was not at fault for the absence of the entirety of his transcript; rather, the transcript is not available from the court reporter. In light of the court reporter's inability to produce a transcript of Petitioner's evidentiary hearing, Petitioner requests this Court order a PCR hearing in his case. Petitioner cannot obtain meaningful appellate review based upon the present Order of Dismissal as found by Judge Dickson in his December 14, 2018 Order.

The undersigned has spoken with counsel for the State, Kelly Oppenheimer, does not oppose the motion.

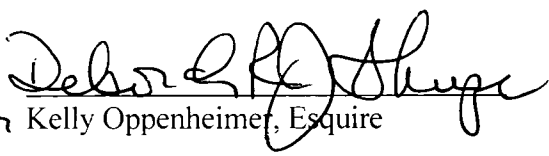
WHEREFORE, the undersigned counsel requests this Court set aside the order dismissing his PCR application and remand for a new hearing.

Respectfully submitted,



Taylor D. Gilliam
Appellate Defender
Attorney for Petitioner

I do not oppose the motion:



for Kelly Oppenheimer, Esquire

This 20th day of December 2018

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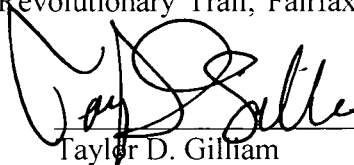
V.

STATE OF SOUTH CAROLINA,

APPELLANT.

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the motion to vacate the order of dismissal and remand for a new post-conviction relief hearing in the above referenced case has been served upon opposing counsel, Kelly Oppenheimer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Quincy Andre McCants, #318280, at Allendale Correctional Institution, 1057 Revolutionary Trail, Fairfax, SC 29827, this 20th day of December, 2018.



Taylor D. Gilliam
Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 20th day of December, 2018.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.