

STATE OF SOUTH CAROLINA
In the Court Of Appeals

APPEAL FROM FAIRFIELD COUNTY
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2018-001649

RECEIVED
JAN 08 2019
SC Court of Appeals

THE STATE,

Respondent,

v.

MICHAEL E. CHAPPELL,

Appellant.

**RETURN TO MOTION FOR RECONSTRUCTION HEARING
OR FOR THE GRANTING OF A NEW TRIAL
IF THE RECORD CANNOT BE RECONSTRUCTED**

Respondent (the State), through undersigned counsel and making return to Appellant's "Motion for a Reconstruction Hearing or for the Granting of a New Trial if the Record Cannot be Reconstructed," would respectfully show unto this Court:

1. Appellant was indicted at the October 2003 term of the Fairfield County grand jury for distribution of crack cocaine (Indictment Number 2003-GS-20-411). Appellant was represented by Carol Ann Tolen, Esquire, and the State was represented by Assistant Solicitor Christine Olle Sloan of the Sixth Circuit Solicitor's Office. On March 19, 2004, the case proceeded to a jury trial *in absentia* before the Honorable Kenneth Goode, pursuant to which Appellant was found guilty as indicted. A bench warrant was issued for his arrest.

Over fourteen (14) years after trial, Appellant was located in Anderson County and was arrested pursuant to the outstanding bench warrant. On August 30, 2018, he appeared before the Honorable John C. Hayes, III, for the sentence to be unsealed. Appellant was represented by Robert Fitzsimmons, Esquire, and the State was represented by Deputy Solicitor Riley Maxwell of the Sixth Circuit Solicitor's Office. Judge Hayes unsealed Judge Goode's sentence of twenty (20) years' imprisonment and then, after hearing from both parties, reduced the sentence to fifteen (15) years' imprisonment. (Tr.p.1-p.16).

2. Appellant timely filed a notice of intent to appeal and has now submitted a motion for a reconstruction hearing. Attached to the motion, Appellant submitted four exhibits including copies of his indictment, a transcript of the proceeding before Judge Hayes, the original and amended sentencing sheets, and a letter from the court reported indicating a transcript of the trial cannot be produced because all of her records from the trial have been destroyed. Appellant first asks this Court to order the parties to reconstruct the record of his trial. He argues that because a trial transcript is no longer available, appellate review is not possible. He asks this court to remand for reconstruction and to appoint a judge to preside over that reconstruction hearing. Appellant alternatively asks this Court to issue an order setting aside his conviction and ordering a new trial. He argues that if the circuit court is unable to reconstruct the record, it must order a new trial. Finally, Appellant asks this Court to hold the timelines for filing his initial brief and designation of matter in abeyance. This return on behalf of the State now follows.

3. The State acknowledges Appellant bears the burden of providing the court with a record sufficient to allow appellate review; however, it nevertheless opposes Appellant's primary request for an order remanding this matter for a reconstruction hearing by pleading, at its first opportunity to do so, the affirmative defense of laches. See *Whitehead v. State*, 352 S.C. 215, 219, 574 S.E.2d

200, 202 (2002) (“Laches is an equitable doctrine, which ‘arises upon the failure to assert a known right.’”); *Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (Ct. App. 2007).

Appellate has been a fugitive for fourteen years. The destruction of the transcript resulted from his willful decision to remain a fugitive. He now seeks the extraordinary relief of convening a reconstruction hearing so he can attempt to build an appellate record by which to challenge his conviction, fourteen years after he chose to skip-out on his trial. The State would suffer prejudice and disadvantage where the trial judge is no longer alive and the participants in any reconstruction hearing would be relying upon fourteen year old memories and/or notes; therefore, it asks this Court to deny Appellant’s request to reconstruct on the basis that it is barred by laches. *Arceneaux v. Arrington*, 284 S.C. 500, 503, 327 S.E.2d 357, 358 (Ct. App. 1985) (“Whether the plaintiff is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party.”).

4. To the extent the Court determines a remand to attempt reconstruction is warranted, the State further opposes any order which would preemptively attempt to set aside Appellant’s conviction and order a new trial in the event the circuit court is unable to reconstruct the record. Such an order would be premature and, contrary to Appellant’s claim, would not automatically result from an inability to reconstruct the record. This is particularly true because, for the same reason argued above in regard to laches, the inability to adequately reconstruct is entirely Appellant’s fault. *See State v. Serrette*, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (tapes of trial destroyed during the ten year delay between trial in absentia and sentencing while appellant was a fugitive).

5. For all of these reasons, the State submits a remand to reconstruct the record is barred by laches and therefore opposes the motion. The State further submits Appellant’s alternative motion

for a new trial must be denied both as premature and as barred because any inability to reconstruct is Appellant's fault.

6. As to the motion to hold filing timelines in abeyance, the State joins in the motion pending final resolution of Appellant's motion for a reconstruction hearing.

WHEREFORE, having made Return, and for all of the reasons stated above, Respondent opposes Appellant's motion for a reconstruction hearing and his alternative motion for the granting of a new trial. The State has no objection to Appellant's motion to hold the appeal in abeyance pending resolution of his other motions.

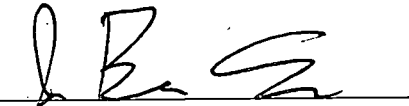
Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

RANDY E. NEWMAN, JR.
Solicitor, Sixth Judicial Circuit

BY:



J. Benjamin Aplin
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ATTORNEYS FOR RESPONDENT

January 8, 2019

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PROOF OF SERVICE

I, Troyeshi Brailey, Legal Coordinator, certify that I have served the Return to Motion for a Reconstruction Hearing or for the Granting of a New Trial if the Record Cannot be Reconstructed on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to Assistant Appellate Defender Joanna K. Delany, SC Commission on Indigent Defense, PO Box 11589, Columbia, SC 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 8th day of January, 2019.


TROYESHI BRAILEY
Legal Coordinator
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(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

January 8, 2019

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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JAN 08 2019
SC Court of Appeals

Re: State v. Michael E. Chappell
Appellate Case No. 2018-001649

Dear Ms. Kitchings:

Enclosed for filing are the original and six copies of the Respondent's *Return to Motion for a Reconstruction Hearing or for the Granting of a New Trial if the Record Cannot be Reconstructed* in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General

Enclosures

cc: Joanna K. Delany, Esquire
Victim Advocacy Division