STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Colleton County

Honorable R. Ferrell Cothran, Circuit Court Judge

ELIJAH C. BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000177

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR judge erred by granting the state's motion to reopen the record after the judge had ruled he was granting Petitioner post-conviction relief on the basis of a juror not being in the courtroom for a pertinent portion of the trial judge's charge on the law where the original, certified trial transcript revealed that was what occurred, where the state did not challenge the accuracy of the trial transcript on direct appeal or in PCR until the PCR judge ruled he was granting relief, and then the second PCR judge impermissibly allowed evidence outside the limited scope of the order reopening the case while reversing the first PCR judge's grant of relief?

STATEMENT

Petitioner was indicted by a Colleton County grand jury on June 26, 2009 for assault with intent to kill, two counts of armed robbery and possession of a weapon during the commission of a violent crime. App. 486; 491; 498; 503. These indictments arose from an incident involving Petitioner, Trevor Fishburne, Kelvin Mitchell and Jermaine Van Dyke that occurred on April 13, 2009.

The State, represented by Amanda Haselden and Mary Jordan Lempesis, called the case to trial on May 17, 2010 in front of the Honorable Perry M. Buckner, the Honorable D. Craig Brown, and a jury. App. 1. Petitioner was represented by L. Scott Harvin. App. 1. After the first three witnesses Judge Buckner was unable to continue presiding over the trial. App. 114, ll. 3-15. Both the State and defense counsel consented to Judge Brown continuing to preside over the trial by himself.[1] Id.

During the jury charge, a juror became ill and left the courtroom for a period of time. App. 269, ll. 1-5. According to the original, certified transcript, after a brief break the judge continued his jury charge on the law. Subsequently, the sick juror returned to the courtroom having missed the portion of the jury charge instructing the jury on the defendant's right to remain silent and on the defense of duress. App. 269 l. 6-App. 271, 1. 16.

Petitioner was ultimately found guilty of one count of armed robbery, one count of strong-arm robbery, and possession of a weapon during the commission of a violent crime. App. 300-301. He was acquitted of assault and battery with intent to kill. Id. Petitioner was sentenced to fifteen years imprisonment on the armed robbery, ten years imprisonment

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[1] It appears from the record that Judge Brown, being new to the judicial bench, was in the process of observing and presiding over trials in the company of another more seasoned judge as part of his judicial training.

suspended on the service of five years with probation to follow on the strong-arm robbery, and five years imprisonment on the possession charge, all to run concurrently. App. 308-309. Petitioner's convictions were affirmed on direct appeal. State v. Brown, No. 2012-UP-071 (Ct. App. Filed February 8, 2012). On November 11, 2012 Petitioner filed a PCR application alleging ineffective assistance of counsel. App. 329-362. The State submitted a return dated February 20, 2013. App. 363-367. An evidentiary hearing was convened before the Honorable James R. Barber, III, on February 19, 2014. App. 368. Petitioner was represented by Tristan Shaffer. App. 368. Ashleigh Wilson appeared on behalf of the State. App. 368.

Prior to the start of the hearing, Counsel Shaffer orally moved to amend Petitioner's PCR application to include a claim that Petitioner was "denied due process under law based on the fact that one of the jurors was not actually present during part of the charge." App. 371, ll. 7-10. The State had no objection to the amendment or to moving forward with the hearing. App. 372, ll. 10-13. Trial counsel Scott Harvin, Petitioner's father Elijah Brown, Sr. and Petitioner testified at the hearing. App. 369.

Judge Barber took the matter under advisement and later advised both parties that after hearing all the testimony and considering all of the evidence he was going to grant Petitioner's PCR application. App. 422, ll. 1-2; App. 431, ll. 9-15. Subsequently, on March 10, 2014, the State filed a motion to reopen the record of the PCR hearing alleging that the transcript contained a technical error regarding the juror entering and exiting the courtroom during the charge on the law. App. 425-428; App. 431, ll. 18-19. A motion hearing was held before Judge Barber on March 31, 2014. App. 429.

The State submitted an affidavit from the prosecuting solicitor, an affidavit from the trial court reporter and six pages of "amended" trial transcript in support of their motion to reopen the

record. App 445-455. The State argued that the original transcript showing the juror's absence during the charge was a technical error that occurred while the court report transcribed the record. App. 433, ll. 10-25;

Counsel Shaffer objected to reopening the record, to the affidavits and to the original transcript being amended. App. 435, ll. 6-11; App. 436 l. 5. The court granted the motion to reopen for the limited "purposes of submitting the tape."[2] App. 439, ll. 9-13. Four years later a second evidentiary hearing was held before the Honorable R. Ferrell Cothran, Jr. on August 6, 2018. App. 458. The State was represented by Christian Saville. App. 459. Petitioner was again represented by Tristan Shaffer. App. 459.

At the second evidentiary hearing the State re-offered the affidavits and "amended" portion of the trial transcript, over objection and in violation of Judge Barber's ruling, as the only evidence to support their argument of a technical error. App. 469-470. The court reporter's tapes, which Judge Barber had ruled were the only evidence to be admitted upon reopening the record, were never offered into evidence. No testimony was taken during the second PCR hearing.

Judge Cothran then issued an order which reversed Judge Barber's decision to grant relief and dismissed Petitioners PCR application on December 31, 2018. App. 474- 484. In dismissing Petitioner's application, Judge Cothran found that "the revised transcript and the affidavits of the court reporter and prosecuting solicitor prove each member of the jury was present for the entirety of the trial judge's jury instruction." App. 481. He held that the original transcript contained a technical error that did not warrant granting of relief. App. 482.

This petition follows.

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2 The court was referring to the court reporter's audiotape recording of the trial.

ARGUMENT

The PCR judge erred by granting the state's motion to reopen the record after the judge had ruled he was granting Petitioner post-conviction relief on the basis of a juror not being in the courtroom for a pertinent portion of the trial judge's charge on the law where the original, certified trial transcript revealed that was what occurred, where the state did not challenge the accuracy of the trial transcript on direct appeal or in PCR until the PCR judge ruled he was granting relief, and then the second PCR judge impermissibly allowed evidence outside the limited scope of the order reopening the case while reversing the first PCR judge's grant of relief.

Facts of the Case

Fishburne, Mitchell and Van Dyke had been "shooting dice" at Fishburne's aunt's house in Green Acres. App. 81, l. 19-App. 82, l. 7. Fishburne lost money to both Mitchell and Van Dyke while they were gambling. App. 86, ll. 2-6; App. 105, ll. 14-19. By the time Petitioner arrived at Green Acres, the men had stopped gambling. App. 105, ll. 20-24.

Shortly after Petitioner arrived in Green Acres, and while they were gambling, Fishburne asked Mitchell for a ride to Hendersonville in order to "get a lick.[3]" App. 82, ll. 7-8; App. 92, ll. 13-15. After they finished gambling the four men left in a car together. App. 106, ll. 4-12. While they were driving Fishburne began to ask Mitchell, the driver, if Mitchell was dating the mother of his child. App. 107, ll. 2-4. As Mitchell was denying being in a relationship with the mother of Fishburne's child, Fishburne pulled out a handgun, told Mitchell to stop the car and demanded money from Mitchell. App. 83, ll. 1-3; App. 107, ll. 5-15. When Van Dyke

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3 "Lick" is a street term that can refer to selling or buying drugs or committing a robbery.

confronted Fishburne about robbing Mitchell, Fishburne responded by telling Van Dyke to "give it up too." App. 107, ll. 17-20.

Petitioner, who initially thought he too was being robbed, told Fishburne to "chill" multiple times. App. 96, ll. 5-7; App. 204, ll. 20-25. Mitchell went to get the money from his pocket, but Fishburne told him "no" and "don't move."[4] App. 83, ll. 5-10; App. 98, ll. 22-25. Petitioner, who was scared because Fishburne had a gun and was waiving it around, reached forward for Mitchell's money and car keys, and then handed those items over to Fishburne. App. 83, ll. 10-11; App. 209, l. 21-App. 210, l. 3. Van Dyke handed his money directly to Fishburne. App. 107, ll. 21-25. Fishburne then got out of the vehicle and told Petitioner to get out of the vehicle as well. App. 204, l. 25-App. 205, l. 1.

Fishburne then proceeded to shoot Mitchell, striking him in the neck. App. 84, ll. 3-4, 15-16. As Mitchell ran from the car Fishburne shot again, striking him in the shoulder. App. 84, ll. 4-6. At this point Fishburne told Petitioner to "come on" and fearing he would be shot if he did not comply, Petitioner went with Fishburne. App. 205, ll. 3-5. The two men were picked up by James "Scrap" Brown, Fishburne's stepfather. App. 118, ll. 17-25. Fishburne and Petitioner were later arrested in Virginia by the U.S. Marshalls. App. 182, ll. 11-15.

The First PCR Hearing

As noted above, Counsel Shaffer moved to amend the application at the PCR hearing. App. 371, ll. 7-19. The State did not object to the amendment and stated that trial counsel would have relevant testimony on the matter. App. 372, ll. 4-13. Trial counsel Scott Harvin testified that the defense at trial was a mix of duress and mere presence. App. 391, ll. 8-12. He had not originally remembered the juror getting sick and leaving during the jury charge but had his

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4 Testimony revealed that Mitchell, while not armed on the day of the incident, did own a handgun and Fishburne knew Mitchell had a gun. App. 91, ll. 20-25; App. 102, ll. 20-21.

memory refreshed by reviewing the transcript the morning of the hearing. App. 393, ll. 8-17. Harvin testified that when the juror became ill, he believed they took a break and he thought the judge sent the entire panel out for five to ten minutes. App. 394, ll. 24; App. 398 l. 20-App. 399 l. 1. He testified it was his belief he would have noticed if a juror came back in to the courtroom while the judge was charging the jury. App. 399, ll. 2-5.

Elijah Brown, Sr., the father of Petitioner, testified at the PCR hearing that he remembered the juror getting sick and leaving the courtroom. App. 413, ll. 1-6. Brown testified that the entire jury took a break when the juror became ill but that the sick juror did not return with the rest of the panel. App. 414, ll. 16-19; App. 415, ll. 6-10. He stated the sick juror returned about three to five minutes after the rest of the panel had come back into the courtroom. App. 416, ll. 3-8. Brown testified, somewhat confusingly, that the judge started talking right after the sick juror left the courtroom, that the judge and the lawyers had a conference at the bench but that the judge was not speaking to the courtroom, and that the judge did not speak to the jury right when they came back from the break. App. 413, ll. 7-8, 19-25; App. 415, ll. 2-5.

Petitioner testified that a juror left because she was sick and crying. App. 418, ll. 16-24. He did not recall the entire jury panel leaving the courtroom after the sick juror but did recall the judge continued to speak to the jury panel while the sick juror was absent. App. 419, ll. 3-6. Petitioner could not say what the judge was talking to the jury about, but he remembered the judge talking to the courtroom. App. 419, ll. 6-10. He said the sick juror was out for about five minutes before returning to the courtroom. App. 419, ll. 11-14.

The Motion to Reopen

After the PCR hearing Judge Barber informed the parties that he intended to grant the post-conviction relief application on the issue of the juror missing portions of the charge on the

law, as clearly indicated by the transcript. App. 431, ll. 10-15; App. 269-271. A week to ten days after the judge notified the parties of his ruling the State filed a motion to reopen the record to submit additional evidence on the issue of the missing juror. App. 431, ll. 18-19. The State sought to enter affidavits from the prosecuting solicitor and the court reporter who transcribed the trial transcript as well as an amended portion of the transcript. App. 433, ll. 16-19.

Counsel Shaffer objected to reopening the record arguing that the State had waived its right to further litigate the issue by not objecting to the oral amendment at the PCR hearing. App. 435, l. 11; App. 437, ll. 18-20. Counsel Shaffer also objected to making the affidavits and the "amended" portion of the transcript part of the record. App. 435, ll. 6-7. Judge Barber noted that the affidavits were relying heavily on memory and that memory would "not overcome what Mr. Shaffer has shown to me in the transcript up to this point." App. 438, ll. 11-13; App. 439, ll. 12-13. Judge Barber ruled that the record could be reopened for the sole purpose of submitting the actual audio recorded tapes of the trial from the court reporter. App. 439, ll. 10-12.

The Second PCR Hearing

The second evidentiary hearing, based on the State's motion to reopen the record, was held four years after the limited ruling reopening the record for submission of the tapes was granted, in front of Judge Cothran. App. 458. Counsel Shaffer argued that he had reviewed the tapes from the court reporter, and they offered no clear indication of what occurred during the time at issue in the transcript. App. 463, ll. 10-22. He again made objections to the affidavits and the "amended" portion of the transcript being submitted as evidence. App. 464, ll. 3-5; App. 467, l. 10. The State provided no live witness testimony and did not submit the tapes into evidence in direct contravention of Judge Barber's ruling to reopen the record for the limited purpose of admitted the tapes.

Discussion

The issue in this matter is twofold. First, the PCR court abused its discretion in reopening the record after it had made a decision on the merits of the case, creating an error that resulted in extreme prejudice to Petitioner. Second, that error, and the subsequent prejudice, was compounded when the State did not submit the evidence allowed by the first PCR court and instead submitted the affidavits and amended transcript pages that were found to be inadmissible by the first PCR court in the motion to reopen hearing.

A motion to reopen the evidentiary record to allow additional evidence is addressed to the sound discretion of the trial judge and will not be reversed absent an abuse of that discretion. State v. Wren, 470 S.E.2d 111 (Ct. App. 1996). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Douglas, 369 S.C. 424, 429–30, 632 S.E.2d 845, 848 (2006). It is well-established that a reporter's transcript is *presumed to be correct.* Abatino v. United States, 750 F.2d 1442, 1445 (9th Cir. 1985) (emphasis added). The party seeking to rebut this presumption must present a reason why a court should suspect inaccuracy. Norris v. Schotten, 146 F.3d 314, 333 (6th Cir. 1998) (holding that a petitioner's speculation is insufficient to call into question the accuracy of trial transcripts).

At the PCR hearing the State made no objection to the amendment of the PCR application, admitting that the issue had been discussed with trial counsel that morning and they were prepared to move forward. During the testimony of trial counsel, the court interjected with concerns about memory being used to supplant the transcript:

The Court: "So we've got your *vague recollection versus a transcript that specifically says, "juror returns" after the duress portion of the charge.*"

App. 399, ll. 13-15 (emphasis added).

...

Q. "It's your testimony today that you would have brought to the Court's attention if the juror was missing during the jury instruction?"

A: "Yes."

The Court: "*If he knew it.*"

App. 411, 17-21 (emphasis added).

It is apparent that Judge Barber correctly thought the certified transcript was entitled to great deference. This is confirmed by the fact that Judge Barber, after considering the testimony and the original record, was going to grant Petitioner relief. At the motion to reopen the record the State sought to rely on the memory of the court reporter and prosecuting solicitor to attempt to rebut the presumption that the original certified trial transcript was inaccurate. Importantly, Judge Barber ruled only the court reporter's tapes could overcome the transcript and that the affidavits, relying on vague and self-serving memory, were not enough.

The presumption of the correct and accurate transcript was more powerful than the memory of the parties to the action. The affidavits presented by the State were merely unsupported assertions of inaccuracy that did nothing to dissuade Judge Barber to dismiss Petitioner's application. Based on the PCR court stating that memory would not be enough to overcome the evidence presented at the original PCR hearing, it follows that the affidavits were merely assertions which were insufficient to rebut the presumption that the transcript was correct. Norris, *supra.*

The record reveals that Judge Barber properly relied on the strong presumption that the original transcript was accurate. Further, he ordered that the State would have to produce clear evidence, more than the mere memory of various parties, to overcome the presumption that the transcript accurately reflected a juror missing a pertinent portion of the charge. Accordingly Judge Barber ruled that the record could be reopened *only to enter the tapes of the court reporter*. However, the tapes obviously had no relevant evidence to support the state's position, as Counsel Shaffer noted to the court during the second PCR hearing, as the state never admit the tapes into evidence.

When the second evidentiary hearing finally reconvened, four years after the motion to reopen, it was in front of a different judge. At that hearing the State did not offer the tapes, in violation of Judge Barber's order, but instead submitted into evidence the affidavits and amended transcript pages previously ruled upon by Judge Barber as inadmissible to overcome the presumption that the original transcript was correct. Judge Cothran improperly accepted the affidavits and amended transcript pages into evidence, over the objections of Counsel Shaffer. This was improper as no circuit judge has the power to review, modify, affirm, or reverse findings of another. Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979). Judge Barber had found the affidavits insufficient and reopened the record solely for the tapes to be admitted. Therefore, the only evidence that could be submitted for considering at the second hearing was the tapes.

Considering the tapes were not entered into evidence the PCR court was required to base its ruling on the testimony at the prior PCR hearing and the original transcript. However, Judge Cothran did not have the ability to view the testimony and pass upon the credibility of the witnesses. When the requested evidence was not presented at this hearing, the final ruling

should have been made by Judge Baber as he had viewed the testimony and passed upon the credibility of the witnesses, determined the affidavits to be insufficient and ruled in the motion to reopen hearing.

It is extremely problematic that the motion to reopen the record was granted *after* a decision on the merits of the case had been made. In general, motions to reopen the record have been granted prior to the case being submitted for decision and prior to any decision being rendered. See, Brown v. La Franc Industries, a Div. of Riegle Textile Corp, 286 S.C. 319, 333 S.E.2d 348 (Ct. App. 1985) (reopening of the record, prior to single commissioner rendering decisions, was proper where opposing party was not prejudiced). See also, State v. Wren, 470 S.E.2d 111 (Ct. App. 1996) (trial court acted within its authority in reopening record after state had rested to allow state to admit drugs into evidence). Further, the affidavits and amended transcript presented by the state at the motion to reopen hearing were found to be inadmissible by Judge Barber. Thus, there was no evidentiary basis upon which to reopen the record at the hearing.

Notably, a review of the original transcript shows that the court reporter properly reflected every time the jury entered or left the courtroom.[5] This stands in stark contrast to the portion of the transcript at issue here which does not reflect the jury leaving as a panel but *only shows the ill juror leaving and returning later during the charge on the law*. Further, the State's attempt to amend the transcript four years after the trial, after having relied on it as accurate during the direct appeal, is tremendously disconcerting. South Carolina Appellate Court Rule

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5 App. 40, ll. 16-18; App. 42, ll. 4-5; App. 44, ll. 24-25; App. 47, ll. 2-3; App. 53, ll. 20-21; App. 113, ll. 5-6; App. 113, l. 25-App. 114, l. 2; App. 176, ll. 2-4; App. 181, ll. 12-13; App. 207, ll. 18-20; App. 207 11. 24-25; App. 211, ll. 23-25; App. 213, ll. 17-19; App. 233, ll. 17-19; App. 245, ll. 12-14; App. 284, ll. 12-14; App. 291, ll. 11-12; App. 292, ll. 23-24; App. 293, ll. 2-4; App. 294, ll. 22-24; App. 300, ll. 13-15; App. 304 l. 25-App. 305, l. 1.

607 requires a court reporter to retain the tapes for a one-year period after transcribing the record in order to give any party to an action a one-year period to challenge the accuracy of the transcript. Challenges made outside of that one-year period, particularly after the transcript has been relied upon as accurate in other proceedings, are untimely and improper. Rule 607(i), SCACR.

Additionally, the proper mode to challenge transcript inaccuracies would be through a hearing before a court where both parties to the action were able to assert their positions through the presentation of witnesses and evidence. See Chessman v. Teets, 354 U.S. 156 (1957) (accused was entitled to be represented, either in person or by counsel, throughout proceedings for settlement of record upon which his conviction would be reviewed). As the U.S. Supreme Court in Chessman noted "on many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution." Id. at 165. Chessman was denied due process when the transcript of his trial was settled at a hearing where he was not represented. It follows then that to change the record of a court proceeding and allow it to be altered or amended by a mere affidavit tramples upon the requirements of the Due Process Clause.

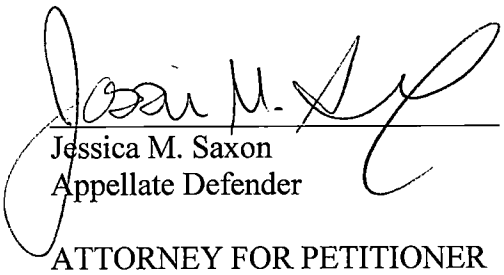
The prejudice to Petitioner in this matter cannot be overstated. At the trial level he was denied his most basic rights to a trial by an impartial jury when the juror was not present for the entire charge on the law. See State v. Burket, 9 S.C.L. 155, 311 (S.C. Const. App. 1818) ("every lawyer knows that twelve lawful men are necessary [to constitute a jury], and that without this number no jury can exist"). While the entire jury charge is important, the portion

that the juror missed was of particular importance as it dealt specifically with not only Petitioner's right to remain silent but to his main defense of duress. To ensure a fair trial by an impartial jury, all twelve members of the panel needed to hear the full charge. See Francis v. Franklin, 471 U.S. 307, 324 n. 9 (1985) (the Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them).

At the PCR level Petitioner's rights were violated when the PCR court reopened the record, after having made a decision on the merits of the case, to allow the State to further litigate the issue it had lost on. Additionally, at the second PCR hearing Petitioner's was further stripped of his due process rights when the State improperly "amended" the transcript through an affidavit, eight years after the trial, in front of a different judge. Unfortunately for Petitioner the final decision in the case was based on affidavits that had been ruled inadmissible and an improperly amended transcript. Instead, the decision should have been issued by the judge who heard the live testimony of the witnesses, had made credibility findings, and had decided to grant Petitioner post-conviction relief. Petitioner was entitled to relief on the merits of his application which were completely supported by the certified transcript that was relied on for years and only challenged when it became the basis upon which to grant a new trial.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of November, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Colleton County

Honorable R. Ferrell Cothran, Circuit Court Judge

ELIJAH C. BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Sara Gunton, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Elijah C. Brown, #340901, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 18th day of November, 2019.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 18th day of November, 2019.

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