

The Supreme Court of South Carolina

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December 19, 2019

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Tristan Michael Shaffer, Esquire
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Chapin SC 29036

Re: Rodney Galimore v. State
Appellate Case No. 2019-001338

Dear Counsel:

Enclosed is a motion (minus the attachments) filed by Division of Appellate Defense. Since you were counsel before the circuit court, I wanted to contact you to determine if you have a copy the exhibits listed in the enclosure to this letter before processing this motion to remand.

I ask that you advise me if you have any of these exhibits within ten (10) days of the date of this letter. If you have any of these exhibits, I ask that you please forward a copy of the exhibit(s) with your response to this letter.

Very truly yours,

CLERK

Enclosures

cc: Joanna Katherine Delany, Esquire

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(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH
MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

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DEC 17 2019

S.C. SUPREME COURT

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

RODNEY GALIMORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2019-001338

MOTION TO HOLD APPEAL IN ABEYANCE AND
REMAND FOR RECONSTRUCTION OF THE PCR RECORD

Pursuant to Rule 240, SCACR, undersigned counsel requests an order to hold petitioner's appeal in abeyance and remand this case to the Beaufort County Court of Common Pleas to reconstruct the record of petitioner's post-conviction relief (PCR) hearing. In particular, petitioner requests an order for reconstruction be issued to allow for reconstruction of the exhibits entered at his PCR hearing, which undersigned counsel has been unable to obtain from either the Beaufort County Clerk of Court or Karen Holley, the court reporter.

In accordance with Rule 240(c)(3), SCACR, petitioner submits the following documents to support this motion: Affidavit from Joanna Delany (Exhibit #1); Notarized Letter from Court Reporter Karen E. Holley (Exhibit #2); Affidavit from Sean Flynn (Exhibit #3); Emails from Melissa Kilby, Judgement Administrator, Beaufort County Clerk of Court (Exhibit #4); Certified Case History (Exhibit #5) Unsigned Affidavit of Jerri Ann Roseneau, Beaufort County Clerk of Court (Exhibit #6); PCR Transcript (Exhibit #7); Order of Dismissal (Exhibit #8).

Procedural history

Petitioner was indicted by the Beaufort County Grand Jury on September 20, 2007, for the offenses of felony DUI, death results; reckless homicide; child endangerment; and driving under suspension. Petitioner proceeded to trial before the Honorable Carmen T. Mullen and a jury on November 17 – 18, 2008 and December 8 – 10, 2008. Petitioner was represented by Gene Hood, who has since passed away; the state was represented by Angela Tanner.

Petitioner was convicted as indicted and he was sentenced to serve concurrent terms of imprisonment of twenty-five years for felony DUI; ten years for reckless homicide; and six months for driving under suspension. Petitioner was sentenced to serve a consecutive ten year term for child endangerment.

After his convictions and sentences were affirmed on direct appeal, petitioner timely filed an application for PCR, and the state made its return. A hearing was held before the Honorable R. Ferrell Cothran, Jr., on August 6, 2018. Exhibit #7, 1. Karen Holley was the court reporter. Exhibit #7, 1. Tristan Shaffer represented petitioner and Christian Saville represented the state. Exhibit #7, 2.

At the PCR hearing, petitioner entered two exhibits and the state entered eight. Exhibit #7, 3. The exhibits are listed in the index of the PCR transcript as follows: PLAINTIFF'S EXHIBIT NUMBER ONE (NOTES FROM EXPERT); PLAINTIFF'S EXHIBIT NUMBER TWO (MAIT FILE); DEFENDANT'S EXHIBIT NUMBER ONE (PHOTO); DEFENDANT'S EXHIBIT NUMBER TWO (PHOTO); DEFENDANT'S EXHIBIT NUMBER THREE (PHOTO); DEFENDANT'S EXHIBIT NUMBER FOUR (PHOTO); DEFENDANT'S EXHIBIT NUMBER FIVE (PHOTO); DEFENDANT'S EXHIBIT NUMBER SIX (PHOTO); DEFENDANT'S EXHIBIT NUMBER SEVEN (CHAIN OF CUSTODY FOR BLOOD SAMPLE); DEFENDANT'S EXHIBIT NUMBER EIGHT (REPORT FROM SLED). Exhibit #7, 3.

Undersigned counsel has been unable to obtain a copy of the above-listed exhibits from either the Beaufort County Clerk of Court or the court reporter. *See* Affidavit from Joanna Delany (Exhibit #1); Notarized Letter from Court Reporter Karen E. Holley (Exhibit #2); Affidavit from Sean Flynn (Exhibit #3); Emails from Melissa Kilby, Judgement Administrator, Beaufort County Clerk of Court (Exhibit #4); Certified Case History (Exhibit #5) Unsigned Affidavit of Jerri Ann Roseneau, Beaufort County Clerk of Court (Exhibit #6).

Accident reconstruction

At the PCR hearing, petitioner alleged, inter alia, that his trial counsel was ineffective for failing to call an accident reconstruction expert at trial to testify that the animation used by the state was unreliable. As evidence on this allegation, petitioner put up testimony by Martin Schussel, who was qualified as an expert in accident reconstruction at the PCR hearing without objection. Exhibit #7, 38, l. 5 – 39, l. 1.

Mr. Schussel explained that he was contacted by petitioner's trial counsel (who died prior to the PCR hearing) and asked to review the materials from the "MAIT team" and provide an opinion on their validity before the trial. Exhibit #7, 39, ll. 5-24. Mr. Schussel explained that he evaluated the materials, "wrote up some notes on them," and sent the materials back to trial counsel. Exhibit #7, 40, ll. 6-22. Mr. Schussel's notes regarding the case as well as the "MAIT file," including an animation shown to the jury, were admitted as exhibits at the PCR hearing. Exhibit #7, 12, ll. 15-22; Exhibit #7, 40, l. 3 – 41, l. 19; Exhibit #7, 69, ll. 7-14.

Mr. Schussel opined that the accident reconstruction animation that was admitted by the state at trial was not reliable. Exhibit #7, 44, l. 22 – 47, l. 13. Nevertheless, trial counsel did not call Mr. Schussel as a witness in petitioner's trial. Exhibit #7, 10, l. 22 – 11, l. 1. Petitioner's PCR counsel therefore argued that trial counsel was ineffective for failing to call Mr. Schussel to testify at trial. Exhibit #7, 5, l. 24 – 6, l. 3.

The state entered six photographs of the scene of the accident it maintained rebutted this allegation of ineffectiveness. Exhibit #7, 76, l. 20 – 80, l. 13.

In its June 13, 2019 Order of Dismissal, the PCR court addressed petitioner's allegation that, "Counsel was ineffective for failing to call an expert witness in rebuttal," and found that counsel was not ineffective for failing to call Mr. Schussel as an accident reconstruction expert. Exhibit #8, 6 – 8.

Blood draw

Petitioner also alleged, inter alia, that his trial counsel was ineffective for failing to challenge the draw of petitioner's blood on constitutional grounds. In response to that allegation, the Assistant Attorney General entered a copy of the chain of custody for

petitioner's blood sample, as well as a copy of the toxicology report from SLED. Exhibit #7, 93, ll. 4-21; Exhibit #7, 94, ll. 3-18.

The PCR court's June 13, 2019 Order of Dismissal also addressed the allegation that, "Counsel was ineffective for failing to challenge [petitioner's] blood draw on constitutional grounds," found that counsel was not ineffective on that ground, and noted the testimony it heard about the chain of custody. Exhibit #8, 8 – 9.

Reconstruction of record

A complete record of the proceedings is necessary to ensure meaningful appellate review of petitioner's claims of ineffective assistance of counsel. As a result of the unavailability of the PCR exhibits and the potential appellate issues presented, counsel requests reconstruction of the record.

Meaningful appellate review is impossible absent a copy of the exhibits under these circumstances. Although the law does not require a "verbatim" transcript, the record must "allow for meaningful review" of petitioner's appeal. *State v. Ladson*, 373 S.C. 320, 324-25, 644 S.E.2d 271, 272-74 (2007).

Through no fault of petitioner, the exhibits are unavailable. *State v. Serrette*, 375 S.C. 650, 652-653, 654 S.E.2d 554, 555 (Ct. App. 2007) (dismissing appeal where lack of transcript was due to the defendant's absence for a ten-year period, and "not a situation where the court reporter's equipment malfunctioned at trial leading to a loss of the trial transcript").

When a transcript has been lost or destroyed, the Court may remand to have the record reconstructed. *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). See *Deaton v. Leath*, 279 S.C. 82, 302

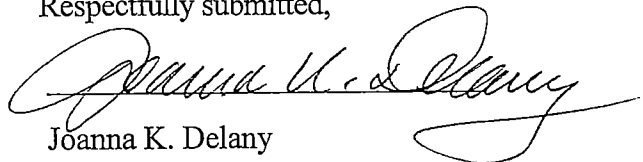
S.E.2d 335 (1983) (granting the appellant's motion to set aside convictions and remand for a new trial where the court reporter's equipment malfunctioned and there was no transcript of the trial court proceedings in the case from which to base an appeal).

Because the exhibits have been lost through no fault of petitioner, and because the exhibits are needed for an understanding of the evidence before the PCR court, undersigned counsel believes that a complete record is needed for meaningful review.

Petitioner respectfully requests an order remanding his case to the Beaufort County Court of Common Pleas for reconstruction of the record, so that the exhibits entered at his PCR hearing may be reconstructed to allow for meaningful appellate review. While this motion is pending, petitioner asks this Court to hold the timelines for filing his petition for writ of certiorari and appendix in abeyance.

WHEREFORE, in order to allow for meaningful appellate review, petitioner respectfully requests this Court to hold the timelines for filing the petition for writ of certiorari and appendix in abeyance during the pendency of this motion and remand his case to the Beaufort County Court of Common Pleas for reconstruction of the exhibits entered in petitioner's PCR hearing.

Respectfully submitted,



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December 17, 2019

ATTORNEY FOR PETITIONER