

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO COLLETON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable James R. Barber, III, Post-Conviction Relief Judge
The Honorable R. Ferrell Cothran, Post-Conviction Relief Judge
The Honorable Edgar W. Dickson, Trial Judge

Appellate Case No. 2019-000177

ELIZAH C. BROWN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

- I. 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 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?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

- I. The post-conviction relief court did not abuse its broad discretion in granting Respondent's motion to reopen the record for the limited purpose of correcting a technical transcription error in the trial record and admitting into evidence a revised transcript and affidavits of trial participants where Respondent had a good faith basis to believe there were errors or omission in the previously provided record and needed additional time to investigate and provide a revised record once this allegation was asserted for the first time at the evidentiary hearing.

STATEMENT OF THE CASE

Petitioner Elizah C. Brown is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Colleton County Clerk of Court. Petitioner was indicted during the June 2009 term of the Colleton County Grand Jury for possession of a weapon during the commission of a violent crime, assault and battery with intent to kill and two counts of armed robbery. L. Scott Harvin, Esquire, represented Petitioner on all charges, and Assistant Solicitors Amanda Haselden and Mary Jordan Lempeisis, prosecuted the case.

On May 17, 2010, Petitioner appeared before the Honorable Perry M. Buckner, circuit court judge, and the Honorable D. Craig Brown, circuit court judge, and jury. After the first three witnesses had testified at trial, Judge Buckner was unable to continue presiding at trial, after which both Petitioner and the State consented to Judge Brown presiding over the trial by himself.¹

The jury found Petitioner not guilty of assault and battery with intent to kill, not guilty of the lesser included offense of assault and battery of a high and aggravated nature, and not guilty of one count of armed robbery. Petitioner was found guilty of one count of armed robbery, one count of the lesser included offense of strong-arm robbery, and guilty of possession of a weapon during commission of a violent crime. Judge Brown sentenced Petitioner to confinement for a period of fifteen years for armed robbery, ten years suspended upon the service of five years and three years' probation for strong-arm robbery, and five years for possession of a weapon during commission of a violent crime. The sentences were ordered to be served concurrently.

Petitioner filed a timely notice of appeal. Appellate Defender Elizabeth A. Franklin-Best, of the South Carolina Commission on Indigent Defense-Office of Appellate Defense perfected the

¹ Judge Brown was new to the bench at the time of Petitioner's trial and was sitting in with Judge Bucker to observe.

appeal. The Court of Appeals affirmed the conviction holding that the trial judge properly allowed testimony regarding Petitioner's flight out of state immediately following the crime. *State v. Brown*, No. 2012-UP-071 (Ct. App. Filed February 8, 2012). The remittitur was returned to the circuit court on March 2, 2012.

On November 21, 2012, Petitioner filed an application for post-conviction relief alleging:

1. Ineffective Assistance of Legal Counsel
2. Violation of 4th, 5th, 6th, and 14th U.S. Constitutional Amendment Rights
3. Unaware of Legal Procedure
4. See Attachments A, B, C, D.²

Respondent served its Return to the application on February 20, 2013. An evidentiary hearing was convened on February 19, 2014 at the Beaufort County Courthouse, before the Honorable James R. Barber, III, circuit court judge. Petitioner was present at the hearing and represented by Tristan M. Shaffer, Esquire. Assistant Attorney General Ashleigh Wilson of the South Carolina Attorney General's Office represented Respondent. Prior to the commencement of the evidentiary hearing, PCR counsel orally moved to amend Petitioner's application to include a claim that Petitioner was denied due process because a juror was absent for a portion of the jury instruction. Counsel for Respondent did not object to the amendment, but stated PCR counsel had informed her of the amendment that morning. (App'x p. 372, ll. 3-13). During the evidentiary hearing, Petitioner went forward the following allegations: trial counsel failed to effectively cross-examine and impeach witnesses Kelvin Mitchell and Jermaine Van Dyke; trial counsel failed to argue the lack of a common plan or scheme; due process violation from the temporary absence of jury panel member; and due process violation from a juror being the mother of codefendant's friend.

² App'x p. 336 - 362

Petitioner testified on his own behalf. As well as his father, Elizah C. Brown, Sr. Trial counsel Scott Harvin, Esquire, testified on behalf of Respondent.

Regarding the allegation of the absent juror, each witness testified as to something different. Trial counsel testified he believed the portion of the transcript which included the parenthetical note from the court reporter that the ill juror returned in the middle of Judge Brown's charge to be an error. (App'x p. 394, ll. 21-22). He recalled that once the juror became ill, the court took a break and stopped the charge, and was in recess for about five to ten minutes until the juror returned. (App'x p. 396, ll. 1-2; p. 397, ll. 18-24; p. 398, ll. 20-22). Trial counsel further explained he would have remembered if the juror had returned in the middle of Judge Brown's charge because the courtroom was designed in such a way that the juror would have had to walk out in front of the entire courtroom to return to the jury box, in full vantage of everyone present. (App'x p. 396).

Petitioner's father testified that the sick juror was absent from the courtroom roughly three to five minutes. (App'x p. 413, ll. 17-18). During which time Judge Brown did not speak to the jury at all and appeared to have a bench conference with present counsel. (App'x p. 413, 19-25; p. 415, ll. 11-17).

Petitioner testified that the sick juror was absent probably five minutes, and during this absence Judge Brown did not speak directly to the jury, but was instead "[t]alking to the courtroom, and I can't say directly to them, but he was talking to them, talking to everybody in the courtroom." (App'x p. 419, ll. 5-12).

At the conclusion of the testimony, Judge Barber told the parties he would be taking the matter under advisement. (App'x p. 422, ln. 1-2). On March 10, 2014, before any ruling had been issued, Respondent filed a Motion to Reopen the Record of a PCR Hearing to allow for the

introduction of several documents and testimony to supplement the evidence presented at the evidentiary hearing to show that the ill juror had returned to the courtroom before the jury instructions were resumed.³ (App’x p. 425-27). On March 31, 2014, Petitioner and Respondent appeared before Judge Barber for a hearing on Respondent’s Motion to Reopen the Record at the Colleton County Courthouse. At the start of the hearing, Judge Barber stated the following for the record:

After hearing the testimony and considering everything, at that time *I think I informed* the parties that I was gonna grant the Post-Conviction Relief, or at least I advised their attorneys, on the basis that I didn’t think I could go against the transcript, which indicated clearly that, that one of the jurors was out of the courtroom when the charge was being given. ... Following that, a week or ten days or something later, Ms. Wilson filed a motion to reopen, and I agreed to have the hearing here today so long as Mr. Brown, and the State waived the matter being heard in Beaufort, and agreed that it can be heard here.

(App’x p. 431, ll. 9-22) (emphasis added).

Respondent submitted an affidavit from the trial court reporter, Rebecca Hill, an affidavit from Assistant Solicitor Amanda Haselden, and an amended section of the trial transcript prepared by Hill.

In an order dated April 28, 2014, Judge Barber granted Respondent’s Motion to Reopen the Record, specifically allowing Respondent to submit the official court reporter’s recording of the jury instructions, as well as any other relevant testimony.

³ Specifically, Respondent’s motion requested the following documentation to supplement the record:

1. An affidavit or testimony from former Assistant Solicitor Amanda Haselden.
2. An affidavit or testimony from Rebecca Hill, Official Court Reporter, showing that after review of her tapes and notes of the Applicant’s trial, it appears the ill juror returned back into the courtroom after a brief recess and the trial judge resumed his jury charge after the juror returned to the courtroom. This evidence will also show that the location of the parenthetical reference to the juror’s return in the trial transcript on page 271, line 16, was misplaced.
3. Amended transcript pages 269-274 certified by Rebecca Hill.

The evidentiary hearing was reconvened on August 6, 2018, at the Beaufort County Courthouse, before the Honorable R. Ferrell Cothran.⁴ Petitioner was present along with PCR counsel, Tristian M. Shaffer, Esquire. Respondent was represented at the hearing by Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office. During this hearing, Respondent stated that Rebecca Hill was served with a subpoena to appear at the hearing but was not present and failed to appear. Respondent then moved to admit the two affidavits and amended transcript pages into evidence for the PCR court to consider in light of Judge Barber's prior order. Judge Cothran allowed the submission of the affidavits and the amended portion of the transcript and took the matter under advisement. Judge Cothran, in an order filed December 31 2018, denied and dismissed the application with prejudice finding trial counsel effectively cross-examined trial witnesses, trial counsel's decision to not argue a common plan or scheme was a strategic one, the purported absence of a juror during a portion of the jury instruction was recorded due to a technical error by the court reporter and none of the witness testimony at the evidentiary hearing supported the claim that she was not present, and the claim that a juror was the mother of codefendant's friend was pure speculation as Petitioner produced no evidence to satisfy his burden of prejudice.

Petitioner filed a notice of appeal from the denial of his claim for relief, and through counsel, filed a petition for writ of certiorari and appendix on November 18, 2019. This return follows.

⁴ Judge Barber retired from the bench in 2017 and is currently listed as an Active/Retired Circuit Court Judge.

STATEMENT OF THE FACTS

On April 13, 2009, Petitioner and his co-defendant, Trevor Fishburne, robbed and shot Kelvin Mitchell and Jermaine Van Dyke. That morning, Mitchell and Van Dyke were ‘gambling a little bit’ and “shooting dice” with Fishburne at a house belong to a relative of Fishburne. Petitioner then arrived at the home, and shortly thereafter, Fishburne asked Mitchell to take him to Hendersonville. All four men got in the vehicle and Mitchell began driving, with Van Dyke in the front passenger seat, and Petitioner and Fishburne in the back seats. (App’x p. 82; p. 85).

They ended up driving to Cane Branch Road instead, and upon arriving, Fishburne told Mitchell to stop driving and pulled out a gun. Fishburne asked for Mitchell’s money, and Petitioner reached into his pockets, took the money and the car keys. Fishburne proceeded to get out of the car and walk to the driver’s side door where Mitchell was and began shooting, striking Mitchell first in the neck and then shoulder as he ran from the vehicle. Fishburne and Petitioner then jumped back into the vehicle and fled the scene. (App’x p. 83-4).

STANDARD OF REVIEW

“On review of a PCR court's resolution of procedural questions arising under the [Uniform] Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, we apply an abuse of discretion standard.” *Love v. State*, 428 S.C. 231, 238, 834 S.E.2d 196, 199 (2019) (citing *Mangal v. State*, 421 S.C. 85, 92, 805 S.E.2d 568, 571 (2017)); *See also Winkler v. State*, 418 S.C. 643, 663, 795 S.E.2d 686, 697 (2016) (applying an abuse of discretion standard to the trial court's decision on a motion for a continuance); *Sweet v. State*, 255 S.C. 293, 296, 178 S.E.2d 657, 658 (1971) (same).

ARGUMENT

- I. The post-conviction relief court did not abuse its broad discretion in granting Respondent's motion to reopen the record for the limited purpose of correcting a technical transcription error in the trial record and admitting into evidence a revised transcript and affidavits of trial participants where Respondent had a good faith basis to believe there were errors or omission in the previously provided record and needed additional time to investigate and provide a revised record once this allegation was asserted for the first time at the evidentiary hearing.**

Petitioner claims the PCR court abused its discretion in reopening the record after it made a decision on the merits of the case. In support of that contention, Petitioner maintains the PCR court had no authority to backtrack on its earlier oral ruling to grant relief and allow the record to be reopened as it caused extreme prejudice to Petitioner's position. However, the record is entirely devoid of any veracity for this narrative offered by Petitioner, as the PCR court acted within its broad discretion to allow the record to be reopened to allow for supplemental evidence to clarify an error contained in the original trial transcript. As a result, the PCR judge did not abuse its discretion in reopening the record and this petition for a writ of certiorari should be denied.

A ruling on a motion to reopen the evidentiary record and to allow additional evidence or testimony is likewise addressed to the sound discretion of the trial judge. *State v. Humphery*, 276 S.C. 42, 43, 274 S.E.2d 918, 918 (1981). "A trial is a search for the truth; concomitantly, liberality is the linchpin of the rule." *State v. Wren*, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App. 1996); *see also Brenco v. S.C. Dep't of Transp.*, 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008) (the trial judge is endowed with considerable latitude and discretion in allowing a party to reopen a case and will not be disturbed on appeal absent an abuse of that discretion); *Chapman v. Associated Transport*, 218 S.C. 554, 63 S.E.2d 465 (1951) (trial judge may allow a party to reopen in order to prevent nonsuit where counsel has omitted evidence by accident, inadvertence, or even because of mistake or misapprehension as to the necessity for offering a particular witness or particular

evidence); *Davis v. Collins*, 69 S.C. 460, 48 S.E. 469 (1904) (judge may also allow the defendant to reopen the case and introduce evidence the defendant failed to introduce through oversight or inadvertence, even though the defendant had closed his case).

Petitioner emphatically argues “[i]t is extremely problematic that the motion to reopen the record was granted *after* a decision on the merits of the case had been made,” but fails to cite to any support of this broad assertion in the record before this Court. (PWC p. 12). It is problematic, however, that Petitioner fails to cite specifically in the record where a decision on the merits had been made prior to Respondent’s Motion being granted. Furthermore, as this Court stated in *Mangal v. State*:

[T]here are situations where the interests of justice require PCR courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure. These considerations should guide PCR courts when struggling to balance procedural requirements against the importance of the issues at stake in PCR proceedings. We encourage trial courts in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues.

Mangal, 421 S.C. 85, 99–100, 805 S.E.2d 568, 575–76 (2017).

Here, the PCR court was implementing the flexibility “consistent with the purpose and spirit of our Rules of Civil Procedure.” *Id.* Furthermore, it was incumbent upon the PCR court to allow Respondent to supplement the record to alleviate any prejudice caused by the Petitioner’s amendment made at the start of the evidentiary hearing. “Motions to amend pleadings to conform to proof may be made upon motion of any party at any time, even after judgment, and are within the sound discretion of the trial judge.” *Ball v. Canadian Am. Exp. Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) (citing Rule 15(b), SCRCP). “Ordinarily, amendments to conform to proof should be liberally allowed.” *Id.* “However, if late amendment of the pleadings would cause prejudice to the opposing party, the court should either deny the amendment or grant a

continuance reasonably necessary to allow the opposing party to meet the amendment.” *Id.* “Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action.” *Id.* “The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it.” *Pool v. Pool*, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998).

Furthermore, in *Love v. State*, this Court enumerated how an applicant’s late amendment, like that of Petitioner, could cause prejudice to the State:

Many PCR grounds are complex and require extensive preparation on the part of the State and the applicant. The prejudice of allowing an amendment that includes a complex issue very shortly before the commencement of a hearing may be apparent... When analyzing the substance of a proposed amendment and any prejudice the State might suffer, a PCR court should consider all relevant circumstances, including, but not limited to, the timing of the motion, the complexity of the new issue, the degree of surprise to the State, the need for and availability of necessary witnesses to defend against the claim, and whether the substance of the proposed amendment is readily apparent from the underlying plea or trial record.

Love, 428 S.C. 231, 241–42, 834 S.E.2d 196, 201 (2019). Here, it is patently clear that the PCR court did not abuse its discretion in allowing the record to be reopened, but instead allowed Respondent to cure any prejudice caused by the late amendment.

Additionally, Petitioner claims the PCR court abused its discretion when it considered affidavits and amended transcript pages submitted by Respondent after the Motion to Reopen the Record hearing was held because that evidence was allegedly considered inadmissible during the hearing. Petitioner bases this contention on the flawed assertion that the “affidavits and amended transcript presented by the state at the motion to reopen hearing were found to be inadmissible by Judge Barber.” (PWC p. 12). Once again, Petitioner fails to cite this allegation in the record, and the signed and entered order granting the motion to reopen clearly allows for the introduction of this documentation into the record. (App’x p. 456-7).

Review of the record clearly shows that the affidavits from Rebecca Hill and Amanda Haseldon, as well as the amended transcript pages, fully complied with the Order signed by Judge Barber. “[T]his Court finds the record in this matter will be reopened and the hearing reconvened to allow the State the opportunity to submit the official court reporter’s recording of the jury instruction portions of Applicant’s trial and *any other relevant testimony*. ... the evidentiary hearing reconvened to allow the State to supplement the record to address the Applicant’s missing juror allegation.” (App’x p. 456-7) (emphasis added). *See State v. Wren*, 470 S.E.2d 111, 112 (Ct. App. 1996) (A motion to reopen the evidentiary record and to allow additional evidence is addressed to the sound discretion of the trial judge); *Spinx Oil Co., Inc v. Fed. Mut. Ins. Co.*, 310 S.C. 477, 482, 427 S.E.2d 649, 651 (1993), *overruled on other grounds*, *Joe Harden Builders, inc. v. Aetna Cas. And Sur. Co.*, 326 S.C. 231, 486 S.E.2d 89 (1997) (the trial judge is endowed with considerable latitude and discretion in allowing a party to reopen a case); *State v. Hammond*, 270 S.C. 347, 242 S.E.2d 411 (1978) (it is within the sound discretion of the trial judge to allow the State to reopen its case and prove an essential element of the offense charged); *State v. Harrison*, 236 S.C. 246, 251, 113 S.E.2d 783, 785 (1960) (it was within the discretion of the trial Judge to reopen the case during a directed verdict motion to permit the State to introduce evidence on the question of an essential fact).

The evidentiary hearing was reconvened on August 6, 2018, before the Honorable R. Ferrell Cothran, during which, the affidavits of Rebecca Hill, Amanda Haseldon, and the amended transcript pages were admitted into evidence to be considered by the PCR court. Judge Cothran did not abuse his discretion in admitting these documents into the record, as he was acting fully within the scope of Judge Barber’s prior order.

South Carolina jurisprudence has a long history of allowing the trial court broad discretion in determining what additional evidence or amendments can be admitted into the record. In *Southern Pine Lumber Co. v. Martin et al.*, 118 S.C. 319, 110 S.E. 804 (1921), this Court said:

We have a statute and rule showing how a case is settled. If there is disagreement in the settling of the case on allowing proposed case or amendments offered, it is the duty of the judge who tried the case to settle it one way or the other. He can allow so much of the case proposed, or amendments as he sees fit, or he can make a report of the whole case himself, and we are bound by whatever case the judge makes. It is his duty to give some settlement and report in order that the cause may be heard on appeal.

In *Thompson v. Bass et al.*, 167 S.C. 345, 166 S.E. 346 (1932), this Court was faced with the question of whether it was proper over the objection of counsel to order new matter inserted into the transcript of record in lieu of official transcript of testimony without any showing that the official stenographic record is incorrect. This Court held that the circuit judge, in the settlement of a case for appeal to this Court, has power, under the law, to correct any error appearing in the case.

In *Camden Inv. Co. v. Gibson*, 204 S.C. 513, 30 S.E.2d 305, 306 (1944), this Court held that while “it is necessary that the rules of court and statutes be followed in perfecting an appeal, ...it would be sacrificing substance for form to hold that appellant's right to have the testimony and exhibits included was lost simply because, through an apparent oversight, its attorneys failed to provide for the inclusion of same in the transcript of record, especially when, within the time for serving the proposed transcript of record, notice was given that the transcript was so amended, rather than notice of a motion before the trial judge to permit an amendment, all of which occurred before the case for appeal had been finally settled by the trial judge.”

Here, Judge Cothran acted within his broad discretion to allow for the introduction of the affidavits and supplemental amended transcript pages into the record. Furthermore, because the admitted documents were provided for within Judge Barber’s signed order, Petitioner cannot meet

is burden of showing Judge Cothran abused his discretion or committed an error of law. Therefore, the PCR court did not abuse its discretion and properly admitted the affidavits and amended transcript pages into the record. Accordingly, Petitioner's petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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