

STATE OF SOUTH CAROLINA)
 COUNTY OF SPARTANBURG)
)
 KESHAUN D. JETER,)
)
 APPLICANT,)
)
 VS.)
)
 STATE OF SOUTH CAROLINA,)
)
 RESPONDENT.)

IN THE COURT OF COMMON PLEAS

ORDER

2015-CP-42-03800

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 SPARTANBURG COUNTY
 401 W. CO.

This matter comes before the Court pursuant to the South Carolina Supreme Court's December 13, 2018, Order regarding Appellate Case No. 2018-000080, the appeal from the denial of Applicant's Post-Conviction Relief (PCR) application. The Supreme Court remanded this matter to this Court to attempt the use of an expert so that Applicant's trial and plea proceedings could be transcribed or, alternatively, to reconstruct the record. After several attempts by digital forensics experts were unsuccessful at retrieving data from the court reporter's hard drive so that Applicant's trial and plea proceedings could be transcribed, an evidentiary hearing was convened on December 19, 2019, at the Greenville County Courthouse. Applicant was present and represented by Rodney Richey, Esquire, and Joanna Delany, Esquire. Respondent was represented by Assistant Attorney General Jacob Isenberg, Esquire.

Lindsey Overby, Esquire, of the Spartanburg County Solicitor's Office; Robert Hall, Esquire, of the Spartanburg County Public Defender's Office; Investigator Louis Nelson, Sr., of the Spartanburg Police Department; Investigator Russell Porter of the Spartanburg Police Department; Complainant, who was a minor at the time the offense was committed; and the Honorable G. Edward Welmaker testified at the hearing. The Court had before it the records of the Spartanburg County Clerk of Court regarding Applicant's convictions, Applicant's records from


the South Carolina Department of Corrections, Applicant's appellate records, the pleadings, and the transcript of Applicant's March 22, 2017, PCR hearing. The Court finds as follows:

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to a Commitment Order of the Spartanburg County Clerk of Court. In January of 2013, a Spartanburg County Grand Jury indicted Applicant for the offense of Criminal Sexual Conduct with a Minor in the Second Degree (2013-GS-42-0027). Robert Hall, Esquire, represented Applicant; Lindsey Overby, Esquire, prosecuted the case. On September 2 – 3, 2014, Applicant proceeded to trial before the Honorable G. Edward Welmaker. However, on the second day of trial, Applicant pleaded guilty as indicted. Judge Welmaker sentenced Applicant to two hundred months imprisonment.

Applicant filed a timely Notice of Appeal. The South Carolina Court of Appeals found that Applicant failed to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR, and dismissed the appeal. The remittitur was issued on December 22, 2014.

On September 10, 2015, Applicant filed an application for PCR in which he alleged ineffective assistance of counsel and that his guilty plea was involuntary. On February 16, 2017, the State made its return. An evidentiary hearing was convened on the matter on March 22, 2017. Applicant was represented by Rodney W. Richey, Esquire, and the State was represented by Assistant Attorney General Ruston W. Neely, Esquire. The undersigned presided over the hearing. A transcript of Applicant's September 2 – 3, 2014, trial and plea proceedings could not be produced because the court reporter's hard drive was defective. The Court took testimony from Applicant; Robert Hall, Esquire; and Lindsey Overby, Esquire. On January 8, 2018, the Court issued an Order of Dismissal in which Applicant's PCR application was denied and dismissed with prejudice.

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Applicant timely filed a Notice of Appeal. Joanna Delany, Esquire, of the Office of Appellate Defense represented Applicant. Assistant Attorney General Johnny James, Jr., and Assistant Attorney General Jacob Isenberg represented the State. On August 31, 2018, Applicant filed a motion to hold his appeal in abeyance and motion to reattempt transcription before remand or remand for reconstruction of the record. The State did not make a return. On December 13, 2018, the South Carolina Supreme Court issued an order remanding the matter to this Court to attempt the use of an expert so that Applicant's trial and plea proceedings could be transcribed or, alternatively, to reconstruct the record.

Several attempts were made to transcribe the September 2 – 3, 2014, trial and plea proceedings, including attempts by experts at the computer forensics firm Envista Forensics of Morrisville, North Carolina. However, attempts to recover the data from the hard drive to allow transcription were unsuccessful. Therefore, an evidentiary hearing was convened on December 19, 2019, at the Greenville County Courthouse to attempt reconstruction of the record. The Court finds the testimony was as follows:

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SUMMARY OF RELEVANT TESTIMONY

Lindsey Overby's testimony

Lindsey Overby testified that she was assigned to prosecute Applicant's case on behalf of the Spartanburg Solicitor's Office. Ms. Overby said she independently recalled the case and also had notes she made during the trial and plea proceedings. Ms. Overby said the case was scheduled for trial on September 2, 2014, and a jury was selected. On the first day of trial, Applicant attempted to plead guilty with an offer of a cap of fifteen years, but the plea was not completed because Applicant indicated he did not wish to waive his constitutional rights.

The trial proceeded, and a jury was selected. No challenges were made to the composition of the jury. Pre-trial motions included a *Jackson v. Denno*¹ hearing at which Investigator Louis Nelson was the only officer who testified. Investigator Porter did not testify. Applicant's mother testified at the hearing. She said that she was present when Applicant confessed and that the officers threatened her to force her to coerce the confession from Applicant. Applicant did not testify. The subjects of the *Jackson v. Denno* hearing were two statements by Applicant: a written statement and a recorded interview. These items were made exhibits. Mr. Hall moved to suppress the statements but the Judge cited *State v. Parker*, 381 S.C. 68, 671 S.E.2d 619 (Ct. App. 2008), and found both statements voluntary and admissible.

The Court heard several other standard pre-trial motions made by Ms. Overby, including a third-party guilt motion, a motion pursuant to *State v. Boiter*, 302 S.C. 381, 396 S.E.2d 364 (1990), and a motion pursuant to the rape shield statute, S.C. Code Ann. § 16-3-659. Ms. Overby said that, although the Complainant had not made any prior allegations of sexual abuse, she made the motion anyway. Ms. Overby said that either she or Mr. Hall asked the Judge to tell Applicant on the record that consent was not a defense to the charge due to the Complainant's age, and she said that the Judge did so advise Applicant. The jury was sworn.

Ms. Overby summarized her opening statement before the jury, which included what she expected the jury to hear and the elements of the offense. The prosecution introduced testimony by two witnesses in its case-in-chief on the first day of trial before Applicant pleaded guilty at the beginning of the second day of trial: testimony by the Complainant, and testimony by Kelly Silver, who was a Sexual Assault Nurse Examiner (SANE).

¹ *Jackson v. Denno*, 378 U.S. 368 (1964).

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The Complainant testified she went to a football game with her cousin [REDACTED] who had dated Applicant. The Complainant said she stayed at [REDACTED] house with her cousin, and her cousin let Applicant in through the bedroom window. The Complainant testified that she eventually went to sleep in a spare room and that in the middle of the night Applicant opened the door and came in the room. The Complainant said Applicant woke the Complainant up, removed the Complainant's pants, and penetrated her anally. The Complainant said she disclosed the assault the next day to a family member, and the Complainant also testified about the medical exam that took place.

Through the Complainant, Ms. Overby introduced photographs of the Complainant's cousin's home where the assault occurred, as well as a photograph posted by Applicant to Facebook that showed himself at the cousin's home.

The SANE nurse, Kelly Silver, testified as to the time and place of the assault that was given by the Complainant. Silver also testified the Complainant had a carpet burn on her knee and a tear to her anus. Ms. Overby noted Silver was living in Asheville, North Carolina, at the time of her testimony. Ms. Overby introduced the rape kit, which included cuttings from the Complainant's underwear, through Silver. A rectal swab from the Complainant and a buccal swab from Applicant were also made exhibits.

At the conclusion of testimony by the Complainant and by Silver, the SANE nurse, Applicant was held in custody overnight. Prior to the start of court the next morning, Applicant's defense counsel, Mr. Hall, said he had met with Applicant at length at the jail and Applicant now wished to plead guilty. Ms. Overby had previously told Mr. Hall that the offer of a cap of fifteen years would remain available until the Complainant testified. Ms. Overby said she now told Mr. Hall that because the Complainant had already testified, the State would not make any negotiations

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or recommendations. Ms. Overby and Mr. Hall met with the Judge in chambers prior to Applicant's plea.

On September 3, 2014, Applicant pleaded guilty. Ms. Overby stated on the record that the plea was going to be straight up, with no sentencing recommendation. Judge Welmaker went through a standard plea colloquy with Applicant, but when the Judge asked Applicant whether he thought his lawyer had done all he should for Applicant, Applicant said no. Judge Welmaker asked Applicant what else he believed Mr. Hall should have done, and Applicant stated that he should have investigated more. Judge Welmaker asked Applicant what he meant by that, but Applicant was unable to answer what else he thought Mr. Hall should have investigated. Applicant went on to waive his rights and plead guilty.

Ms. Overby stated that despite the Judge having presided over the trial, she nevertheless gave a recitation of the facts at the guilty plea. Ms. Overby went through the age of the Complainant, where the offense occurred, and how the Complainant came to know Applicant through her cousin. Ms. Overby provided the Judge a summary of the Complainant's five-page written statement. Ms. Overby provided the Judge with a summary of the SANE nurse's findings, including evidence that the Complainant had carpet burn to her right knee and a tear to her anus. Ms. Overby provided Judge Welmaker with a summary of Applicant's written statement.

Ms. Overby told the Judge that DNA evidence in the case was semen on a cutting from the rear of the Complainant's underwear which was a one-in-five-hundred-ten-million probability the DNA was Applicant's. Ms. Overby said she told the court that a rectal swab taken as part of the rape kit showed a DNA mixture of two contributors, and that neither Applicant nor the Complainant could be excluded as contributors to the mixture.

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was held, and both Investigators Louis Nelson, Sr., and Russell Porter testified. Investigator Porter said he wrote Applicant's statement for him as verbatim as possible and further said he had no recollection of ever talking to Applicant's mother, [REDACTED]. Investigator Nelson said he and Investigator Porter questioned Applicant at City Hall and that Applicant waived his rights and began talking. Investigator Porter said they removed Applicant's handcuffs and videotaped the interrogation. Investigator Porter said Applicant was not intoxicated or intellectually impaired. The State entered Applicant's waiver of rights as an exhibit.

The defense called Applicant's mother, [REDACTED] advance their theory that she was tricked into convincing Applicant to confess. Mr. Hall argued to suppress the statement but Judge Welmaker admitted it.

Judge Welmaker advised Applicant that consent was not a defense because of the Complainant's age. The jury was sworn, and the State and the defense made brief opening statements.

Mr. Hall said the Complainant testified to the facts as related by Ms. Overby during Ms. Overby's testimony. The Complainant said her cousin allowed Applicant to sneak into the house after a football game, and the Complainant went into a spare bedroom to sleep. The Complainant testified Applicant came in and pulled her pants down and pulled his own pants down enough to expose his penis. The Complainant said she told Applicant to stop but he did not. The Complainant testified Applicant tried to penetrate her vaginally but when that did not work, he penetrated her anally. She did not know whether he ejaculated. The Complainant testified she did not tell anyone until later. Mr. Hall based his cross-examination on the fact that the Complainant had the opportunity to tell people long before she did.

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The SANE nurse testified, Mr. Hall objected to her being qualified as an expert, and the Judge sustained his objection. The SANE nurse had never previously been qualified as an expert. The SANE nurse testified about what was in the rape kit. Mr. Hall cross-examined the SANE nurse on whether the Complainant told her she had locked the door to the spare room.

Mr. Hall said court broke for the evening and he spoke with Applicant, who said he wanted to plead guilty. Mr. Hall told Applicant that in the majority of cases, once the victim testifies, it is a straight-up plea. Mr. Hall acknowledged his testimony at Applicant's prior PCR hearing that he was unsure whether the plea offer was still in place on the morning of September 3, 2014, but said that he told Applicant he faced zero to twenty years. Mr. Hall said he explained to Applicant that the Judge did not have to give Applicant credit for time served on home detention, and he explained that the offense was serious and violent.

Mr. Hall said he was a former Magistrate Judge and a former prosecutor and was very familiar with plea colloquies. As Judge Welmaker advised Applicant of his rights, Mr. Hall checked them off in his notes. Applicant told the Judge he was not satisfied with Mr. Hall's representation because Mr. Hall should have investigated more. Applicant was unable to articulate what else Mr. Hall should have investigated, and so the Judge found there was a substantial factual basis for the plea and accepted the plea.

Ms. Overby went through her presentation of the facts. Applicant's family members were there, and Applicant's mother addressed the court. Mr. Hall spoke in mitigation and said that Applicant was in Adult Education and was about to get his diploma, and that Applicant likely had a job lined up at Adidas. Applicant apologized to the Complainant's family and to his own family for putting them through this. The Complainant and her family accused Applicant's friends of

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threatening them, but Mr. Hall got everyone to admit it was just rumor and that there was no proof of any threats.

The State and the defense agreed this was Applicant's first brush with law enforcement. Mr. Hall asked for credit for time served both in jail and while on home detention, but the Judge did not give Applicant credit for time spent on home detention. Judge Welmaker sentenced Applicant to two hundred months, which is about sixteen and a half years.

Louis Nelson, Sr.'s testimony

Louis Nelson, Sr., testified that he was a violent crime investigator with the City of Spartanburg's police department. Investigator Nelson said that he assisted Investigator Porter with Applicant's case. Investigator Nelson could not recall testifying at any hearings at Applicant's trial.

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Russell Porter's testimony

Russell Porter testified that he was the lead investigator assigned to Applicant's case. Investigator Porter did not remember testifying at a hearing pursuant to *Jackson v. Denno* in connection with Applicant's trial, but he remembered that Judge Welmaker ruled Applicant's statement was admissible. Investigator Porter recalled the substance of Applicant's statement and said he remembered Applicant's defense counsel objecting to the statement's admission.

Complainant's testimony

The Complainant testified that she was the victim in the case and that she was present for Applicant's trial in September of 2014. The Complainant stated she had heard parts of the testimony by Ms. Overby and Mr. Hall at this reconstruction hearing, although she had walked out of the courtroom at times. The Complainant said that the testimony by Ms. Overby and Mr. Hall was a fair and accurate recollection of what the Complainant testified to at trial. The Complainant

did not wish to make any additions or take any exceptions to the testimony she had heard from others at the reconstruction hearing.

Judge Welmaker's testimony

Judge Welmaker testified that he did not have an independent recollection of Applicant's trial and plea proceedings but said that according to Applicant's sentence sheet, it appeared that he sentenced Applicant on September 3, 2014. Judge Welmaker said he had taken many guilty pleas in his career and that he followed the standard plea colloquy provided by Court Administration when he did so, making sure Defendants were advised of their constitutional rights and the consequences of their pleas. Judge Welmaker explained that he would not have accepted a guilty plea if the Defendant did not freely and voluntarily waive his rights.

Judge Welmaker testified that he always asked Defendants whether they were satisfied with their attorneys and said that if a Defendant had expressed dissatisfaction with his attorney, he would have asked more questions about the matter before accepting a plea. Judge Welmaker said that he would not have accepted Applicant's plea unless he had advised Applicant of his constitutional rights and the consequences of his plea (including any minimum and maximum sentences that could be imposed). Judge Welmaker further testified that the Applicant had freely and voluntarily waived those rights and that the Judge had found a substantial factual basis for the plea.

Keshaun Jeter

This Court advised Applicant that he had a right to remain silent and allowed him to speak with his attorneys before he decided whether to testify. *Mitchell v. U.S.*, 526 U.S. 314, 326 (1999).

Mr. Jeter decided not to testify.

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At the conclusion of the reconstruction hearing, the Court asked Applicant if he was satisfied with the services of Mr. Richey as his PCR counsel, and Applicant said that he was not. Applicant asked the court to appoint new PCR counsel.

Other Evidence

Exhibits were entered that included the State's witness list from trial, an affidavit by Private Investigator Pat Kiefer regarding his attempt to subpoena the SANE nurse, and the Motion and Order regarding reconstruction which were filed in the South Carolina Supreme Court. The Court also had before it all exhibits introduced during trial. The parties stipulated that the Complainant's mother, Ms. Katisha Gill, did not testify during the trial, but she did address the Plea Court at sentencing. The parties also stipulated that Applicant's mother, Camille Jeter, who testified at the *Jackson v. Denno* hearing, was now deceased.

Other Motions

Lauren Barnwell, Esquire, of the South Carolina Victim's Assistance Network was present at the beginning of the hearing and moved to have the Complainant's subpoena quashed on the basis that the Complainant did not testify at the guilty plea. This Court, finding that the Complainant's testimony should be taken in order to reconstruct a complete record, denied the Motion.

APPLICABLE LAW

The "burden is on the appellant to provide the appellate court with an adequate record for review." *State v. Serrette*, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007). "Where a transcript has been lost or destroyed, a court may remand to have the record reconstructed." *Koon v. State*, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004). "Where there is a disagreement as to what the record on appeal should contain, the duty and responsibility of settling the question rests upon the trial

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judge.” *China v. Parrott*, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968). “[P]rocedural due process requires that the parties to a rehearing must be provided an opportunity to be heard and to confront and cross-examine witnesses.” *Adams v. H.R. Allen, Inc.*, 397 S.C. 652, 653, 726 S.E.2d 9, 10 (Ct. App. 2012). Where the conclusory and summary nature of a reconstructed record does not allow for “meaningful appellate review,” a new trial is proper. *State v. Ladson*, 373 S.C. 320, 321, 644 S.E.2d 271 (Ct. App. 2007).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the record has been adequately reconstructed. Testimony established that pre-trial hearings were held which included a hearing pursuant to *Jackson v. Denno*, after which the Trial Court conducted a complete analysis of the statements’ admissibility. The Trial Court denied the defense’s motion to suppress, and the statements were determined to be voluntary.

No objections or exceptions were made to the selection of the jury. Standard pre-trial motions were made, to which the defense had no reasonable basis upon which to object.

The State admitted the testimony of two witnesses during its case-in-chief. The Complainant testified to her account of the offense, and her testimony was unobjectionable. The SANE nurse testified, and she was not qualified as an expert based on the defense’s objection. The SANE nurse testified as a fact witness to her dealings with the rape kit.

The court adjourned for the day. The court came back the next morning, and Applicant entered a guilty plea. From all accounts, the plea was entered freely and voluntarily, and the standard plea colloquy was administered.

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SOUTH CAROLINA
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This Court further finds Applicant is entitled to a new PCR hearing since he did not have the benefit of inspecting and analyzing the record of his trial and plea proceedings in conjunction with his prior PCR hearing.

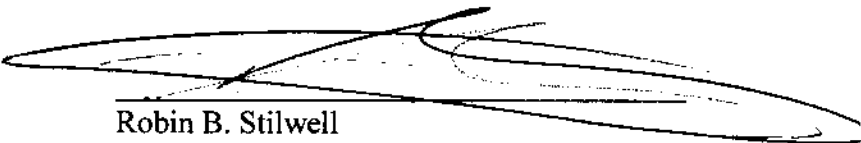
This Court also hereby appoints Susannah Ross, Esquire, as counsel of record in Applicant's PCR proceedings.

CONCLUSION

IT IS THEREFORE ORDERED THAT

1. A new PCR hearing shall be scheduled so that Applicant may use the reconstructed record, and
2. Susannah Ross, Esquire, is appointed to represent Applicant in this matter.

AND IT IS SO ORDERED this 17th day of May, 2020.


Robin B. Stilwell

Greenville, South Carolina

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CLERK OF COURT
SPARTANBURG COUNTY
ANY W. CLK



State of South Carolina
The Circuit Court of the Thirteenth Judicial Circuit

Robin B. Stilwell
Judge

Greenville County Courthouse
305 East North Street, Suite 315
Greenville, SC 29601-2113
Phone: (864) 467-8406
Fax: (864) 235-3625
rstilwellj@sccourts.org

May 18, 2020

The Honorable Amy W. Cox
Spartanburg County Clerk of Court
180 Magnolia Street, Suite 500
Spartanburg, SC 29306

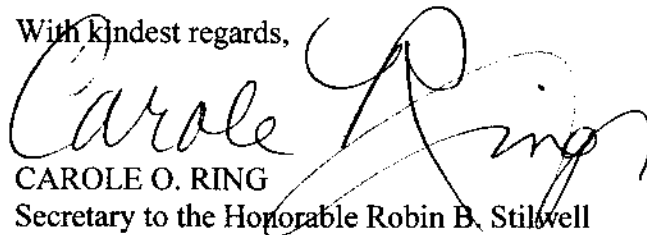
RE: Keshawn D. Jeter vs. State of South Carolina
2015-CP-42-03800

Dear Ms. Cox:

Enclosed herewith please find an Order in the above-referenced matter. Judge Stilwell has asked that I send it to you for filing and for distribution to all interested parties.

Please let me know if you should need anything else regarding this matter.

With kindest regards,


CAROLE O. RING
Secretary to the Honorable Robin B. Stilwell

cor
Enclosure

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