STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Organburg County

George M. McFaddin, Circuit Court Judge

RECEIVED

Nov 02 2020

S.C. SUPREME COURT

SHAKEIA BUTLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-000365

MOTION TO VACATE
THE ORDER OF DISMISSAL AND
GRANT A NEW POST-CONVICTION RELIEF HEARING

Pursuant to Rule 240 of the South Carolina Appellate Court rules, undersigned counsel requests an order setting aside the one-page order denying PCR relief signed by the Honorable Kristi Harrington dated October 27, 2014. Petitioner cannot receive meaningful appellate review in this case, as there is no formal Order of Dismissal; Judge Harrington is no longer on the bench; and an important transcript bearing on an appealable issue cannot be produced. As will be further explained below, Petitioner respectfully requests a new PCR hearing.

Procedural History

This case has a complicated procedural history and is pending before this court for belated appellate review pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Petitioner was indicted by an Orangeburg County grand jury in 2009 for murder. She pled to voluntary manslaughter before the Honorable Edgar Dickson on January 28, 2010. Jillian Ullman and Peggy Hinds represented Petitioner; Don Sorenson appeared on behalf of the state. Subject to a negotiated plea, she received a sentence of twenty-six years. A hearing was held the following week regarding Petitioner's eligibility for early parole under S.C. Code Ann. § 16-25-90. That request was denied, and her conviction was affirmed. State v. Butler, Op. No. 2012-UP-252 (S.C. Ct. App. filed April 25, 2012).

Petitioner filed her first application for post-conviction relief on April 12, 2012. The state filed a Return and Motion to Dismiss on June 25, 2012. A Conditional Order of Dismissal was signed two days later, on June 27, 2020, based upon Petitioner's failure to state a claim under the PCR statute. Prior to the signing of that Order, Petitioner filed a second application for post-conviction relief on June 15, 2012. This application contained more specific allegations, including the claim that plea counsel was ineffective for failing to obtain early parole for Petitioner under the battered spouse statute. A Motion for Merger was filed by the state on July 6, 2012. An Order granting the motion and merging the cases was signed on July 12, 2012. A Motion to Vacate the Conditional Order of Dismissal was filed on August 31, 2012, and an Order granting the motion was filed on October 1, 2012.

Petitioner moved for funding to consult with an expert regarding battered spouse syndrome in order to prove her claim that plea counsel was ineffective for failing to

utilize an expert at the plea. A hearing on the motion occurred on May 29, 2014 before the Honorable Maite Murphy. The transcript from that hearing is unavailable.[1] At the motion hearing, the PCR court heard testimony from plea counsel and Petitioner. An Order Denying Applicant's Motion for Funding was signed by Judge Murphy on August 22, 2014.

A PCR evidentiary hearing was then held before the Honorable Kristi Harrington on October 27, 2014. Joshua Koger, Jr. represented Petitioner; J. Clayton Mitchell appeared on behalf of the state. A one-page order denying relief was signed by Judge Harrington the same day of the hearing and is attached hereto as Exhibit B. A Form 4 Order, attached as Exhibit C was signed on July 6, 2016.[2] No notice of appeal was filed from either order.

Petitioner filed another application for post-conviction relief on May 19, 2017. Petitioner alleged that her PCR attorney failed perfect the appeal and sought a belated PCR appeal pursuant to Austin v. State. The state filed a Return and Partial Motion to Dismiss and requested a hearing on Petitioner's allegation that she was denied her right to appeal from the dismissal of her previous PCR action.

A hearing was held before the Honorable George M. McFaddin, Jr. on February 4, 2020. Based on a statement from prior PCR counsel admitting that he did not file a notice of appeal, the state consented to belated appellate review. A Consent Order

[1] See attached e-mail from Court Reporter Joy Rueger indicating the transcript cannot be produced marked as Exhibit A.

[2] Upon information and belief, the Form 4 Order was signed by the Honorable Edgar Dickson. Although the signature is indecipherable, Judge Code 2153 is listed on the Form 4 Order.

granting the right to seek belated appellate review pursuant to Austin v. State was signed by Judge McFaddin and filed on February 24, 2020.

Discussion

I. The lack of a statutorily compliant Order of Dismissal precludes meaningful appellate review, and since the original PCR judge is no longer on the bench, Petitioner's case should be remanded for a new PCR hearing.

The Uniform Post-Conviction Procedure Act in South Carolina sets forth that the PCR court "shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. This order is a final judgment." S.C. Code Ann. § 17-27-80. As can be seen from the two orders denying relief, both Judge Harrington's 2014 order and Judge Dickson's 2016 form 4 order, no findings of fact or conclusions of law are present as required by law.

This Court has recently addressed inadequate PCR orders in Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019). In Fishburne, this Court remanded the case to the PCR court "for the issuance of a supplemental order setting forth findings of fact and conclusions of law on the PCR ground that was not addressed in the original order." Id. at 517, 832 S.E.2d at 590. This Court discussed the importance of an order of dismissal including findings of fact and conclusions of law in addition to listing many of the prior cases with similar holdings. See McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991); Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992); McCullough v. State, 320 S.C. 270, 464 S.E.2d 340 (1995); Bryson v. State, 328 S.C. 236, 493 S.E.2d 500 (1997); Simmons

v. State, 416 S.C. 584, 788 S.E.2d 220 (2016). In instances where the PCR court's order is insufficient, there can be no meaningful appellate review.

This matter is further complicated by both the Austin posture of the case as well as the fact that the PCR judge is no longer on the bench such that a Fishburne remand would not be practical. The PCR hearing was held on October 27, 2014, over six years ago. Present were counsel for Respondent, J. Clayton Mitchell; counsel for Petitioner, Joshua Koger, Jr.; Petitioner; and plea counsel, Jillian Ullman. The undersigned has participated in a reconstruction hearing once before and is currently counsel of record on two other cases remanded for reconstruction. While reconstruction of the order may be an option in other scenarios, in this instance the judge who presided over the PCR hearing is no longer on the bench. A proper Order of Dismissal would contain, in addition to the findings of fact and conclusions of law, credibility determinations which cannot be gleaned from a PCR transcript. It is unclear how a new Order of Dismissal could be drafted when the prior PCR judge who presided over the PCR hearing has no judicial authority. Further, the efficacy of reconstructing the intangibles, including credibility findings, from a hearing from over six years ago may not yield productive results.

II. The unavailability of the motion for funding hearing transcript, which would have contained testimony from Petitioner and plea counsel, prevents meaningful appellate review, especially in light of the lack of a proper Order of Dismissal.

When a trial transcript has been lost or destroyed, the Court may vacate the conviction and sentence and remand for a new trial if meaningful appellate review is not possible. See Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); overruled

on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002); Deaton v. Leath, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983); China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992); State v. Ladson, 373 S.C. 320, 325, 644 S.E.2d 271, 273-274 (Ct. App. 2007).

In Deaton, supra, the defendant's convictions were set aside and a new trial had 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. Citing Deaton, this Court denied a request for reconstruction in State v. Serrette, 375 S.C. 650, 652-653, 654 S.E.2d 554, 555 (Ct. App. 2007) where the reason for the lack of transcript was due to the defendant's absence for a ten-year period, which this Court explained was "not a situation where the court reporter's equipment malfunctioned at trial leading to a loss of the trial transcript." In the matter at hand, Petitioner was not at fault for any of the difficulties in her case; rather, the transcript of the motion for funding hearing is not available from the court reporter due to matters outside Petitioner's control. Upon realization that her prior PCR counsel did not appeal the denial of her PCR application, Petitioner followed the proper procedure and filed another application under Austin. This case presents a confluence of obstacles wherein original PCR counsel did not file a notice of appeal, the original PCR judge who signed an insufficient order is no longer on the bench, and the transcript from an important hearing over six years ago is unavailable.

In light of the court reporter's inability to produce a transcript of the motion for funding hearing, coupled with the lack of statutorily compliant Order of Dismissal, Petitioner requests this Court order a new PCR hearing, with the option to request

funding for a battered spouse expert. Petitioner cannot obtain meaningful appellate review based upon the present one-page Order signed by Judge Harrington or the Form 4 Order signed by Judge Dickson. The undersigned cannot determine how, if at all, the denial of funding affected the PCR judge's decision to deny relief.

The undersigned has spoken with counsel for the state, Benjamin Limbaugh, numerous times about this matter. Most recently, the undersigned sought consent for this motion in an e-mail on October 22, 2020 but did not receive a response.

Respectfully submitted,

s/Taylor D. Gilliam
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