

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Colleton County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

Jan 11 2021

S.C. SUPREME COURT

JACOBY FIELDS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-001229

MOTION TO HOLD APPEAL IN ABEYANCE
AND
MOTION TO REMAND FOR RECONSTRUCTION OF
POST-CONVICTION RELIEF HEARING

Pursuant to Rule 240 of the South Carolina Appellate Court rules, undersigned counsel requests an order requiring the parties to reconstruct Petitioner's post-conviction relief hearing originally held before the Honorable Deadra L. Jefferson on August 30, 2013. While this motion is pending, Petitioner asks this Court to hold the timelines for filing his appendix and petition for certiorari in abeyance.

In support of his motion, Petitioner would present the following:

1. The undersigned represents Petitioner in his appeal before this Court.

2. The transcript from Petitioner's post-conviction relief hearing cannot be produced or ascertained by the Court Reporter, Susan Perron. (See e-mail from Retired Court Reporter e-mail account dated October 2, 2020, attached as Exhibit A).

3. In order to allow for meaningful appellate review, the record must be reconstructed.

PROCEDURAL HISTORY

4. Petitioner was indicted by a Colleton County grand jury in October 2008 for one count of murder, four counts of burglary in the first degree, and one count of burglary in the second degree.

5. The state served a notice to seek the death penalty and extended an offer of life without parole. Petitioner pled guilty as indicted before the Honorable Carmen T. Mullen on December 21, 2011 and was sentenced to life without parole.

6. Petitioner filed an application for post-conviction relief on August 22, 2012.

7. The state filed its Return on February 21, 2013.

8. An evidentiary hearing was held before the Honorable Deadra L. Jefferson on August 30, 2013 at the Beaufort County Courthouse. Jeffrey Butler represented Petitioner; Ashleigh Wilson appeared on behalf of the state.

9. Five witnesses testified at the hearing: Petitioner; Charlene Fields; Travell Green; defense counsel S. Boyd Young; and defense counsel C. Andrew Carroll.

10. According to an Order of Dismissal signed by Judge Jefferson on January 15, 2014, relief was denied on all claims.

11. Because no notice of appeal was received by this Court, Petitioner filed a second post-conviction relief action on November 30, 2016, requesting belated review under Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

12. Assistant Attorney General Ruston Neely filed a return and partial motion to dismiss on August 3, 2017. The state moved to dismiss all allegations beyond Austin review and requested an evidentiary hearing on the Austin request.

13. Over three years later, by way of a Consent Order Granting Appeal Pursuant to Austin v. State signed August 20, 2020, Judge Jefferson granted belated appellate review.

14. The undersigned's office requested the transcript from the August 30, 2013 hearing on October 2, 2020. The court reporter was unable to produce the transcript because the five-year window under Rule 607, SCACR, had closed. The court reporter advised "the records to produce this transcript are no longer available." See Exhibit A.

ARGUMENT

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 his case; rather, the transcript is not available from the court reporter due to matters outside Petitioner's control. Upon realization that his prior PCR counsel did not perfect the appeal following the denial of his PCR application, Petitioner followed the proper procedure and filed another application under Austin.¹

The case which first provided a remedy in the form of delayed appellate review, Austin v. State, saw this Court reverse the summary dismissal of a second PCR application and remand for an evidentiary hearing, where the petitioner alleged in his second application that his first PCR counsel was ineffective for failing to seek appellate review. 305 S.C. 453, 409 S.E.2d 395 (1991). Specifically, this Court stated: "Because petitioner is entitled to the assistance of appellate counsel on PCR, and because we must craft a remedy to correct the unfairness which has occurred, we find his allegation that counsel failed to seek review in this case sufficiently states a claim for ineffective

¹ The court reporter's tapes from Petitioner's post-conviction relief hearing were presumably available until August 2018, based on the timelines set forth in Rule 607(i), SCACR. In future cases, either PCR counsel or counsel for the state could request the tapes in cases involving belated review under Austin to keep the deadline from passing and the tapes being destroyed.

assistance.” Id. at 454, 409 S.E.2d at 396. Thus, “[u]nder Austin, a defendant can appeal a denial of a PCR application after the statute of limitations has expired if the defendant either requested and was denied an opportunity to seek appellate review, or did not knowingly and intelligently waive the right to appeal.” Odom v. State, 337 S.C. 256, 260, 263, 523 S.E.2d 753, 755, 756 (1999) (“The one-year statute of limitations for PCR applications is not applicable to appeals filed pursuant to Austin v. State.”); see also Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002) (“We have held that the PCR statute of limitations found in S.C. Code Ann. § 17–27–45(A) (Supp.2001) does not apply to Austin claims.”).

Petitioner respectfully requests an order for the remand of this matter and subsequent reconstruction of Petitioner’s PCR hearing in order to perfect the certiorari appeal in this case. A reconstruction hearing is appropriate because the incomplete nature of the PCR hearing transcript prevents this Honorable Court from conducting a meaningful appellate review. Ladson at 325, 644 S.E.2d 271, 274. See also In re D.W., 171 N.C.App. 496, 615 S.E.2d 90, 94 (2005); State v. Chanze, 211 W.Va. 257, 565 S.E.2d 379, 382-83 (2002) (finding criminal defendant is entitled to meaningful appellate review of his lower court proceedings, and if this is not possible from a reconstructed record, a new trial is appropriate).

In the present case, the entire PCR hearing transcript cannot be produced. A reconstructed transcript of his PCR hearing is necessary for appellate counsel to represent him effectively, and for this Court to give meaningful appellate review of his conviction. Petitioner also respectfully requests that the Order remanding this matter contain language giving the trial court the option to conclude that the record cannot be

reconstructed with the specificity to support meaningful appellate review. “It is simply unrealistic and unreasonable to think that a trial judge and counsel can—under these circumstances—reconstruct a proper record that will permit meaningful appellate review, especially in light of our issue preservation rules.” Ladson, 373 S.C. at 326, 644 S.E.2d at 274.

While this motion is pending, Petitioner asks this Court to hold the timelines for filing his petition for certiorari and appendix in abeyance. The undersigned discovered this predicament early and endeavored to prepare this motion before taking any extensions in Petitioner’s case.

The undersigned has spoken with counsel for the state, Benjamin Limbaugh, about this matter. On the morning of January 6, 2021, the undersigned sought consent for this motion in an e-mail that that contained the attached Exhibit A; no response was received.

Respectfully submitted,
s/Taylor D. Gilliam
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January 11, 2021