

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge
—————

RECEIVED

Apr 12 2021

S.C. SUPREME COURT

ADRIENNE RANDOLPH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-000788
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AMENDED PETITION FOR WRIT OF CERTIORARI
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ISSUE PRESENTED

Whether the PCR judge erred in signing the order of dismissal that made findings of fact, conclusions of law, and credibility determinations where the judge was a successor judge who did not preside over the PCR hearing and did not comply with the requirements of Rule 63, SCRCP, prior to signing the order?

STATEMENT

In January of 2014, the Orangeburg County Grand Jury indicted Petitioner, Adrienne Randolph, for murder. App. 60-61. The state, represented by Harrison Bell, called the case to trial before the Honorable Maite Murphy and a jury during the December 2015 term of General Sessions Court. App. 1; App. 37, ll. 1-2. Petitioner was represented by Carl Grant. App. 1. On December 16, 2015, Petitioner stopped the trial¹ and entered a guilty plea to the lesser included charge of voluntary manslaughter. App. 1; App. 3, ll. 10-13.

Judge Murphy accepted Petitioner's plea and sentenced her according to the negotiated plea deal to a term of imprisonment for eighteen years and six months, with credit for time served both in custody and on house arrest. App. 14, ll. 5-17. Petitioner appealed her conviction and sentence; however, the appeal was dismissed on March 10, 2016, pursuant to Rule 203(d)(1)(B)(iv), SCACR. App. 18; App. 24.

On December 15, 2016, Petitioner filed an application for post-conviction relief alleging, *inter alia*, that her guilty plea was involuntary. App. 17-23. The state filed a return and partial motion to dismiss dated July 25, 2017. App. 24-30. An evidentiary hearing was convened before the Honorable Kristi Harrington on December 12, 2017. App. 31. The state was represented by Ruston Neely. Petitioner was represented by Art Aiken. App. 32. At the conclusion of the hearing Judge Harrington took the matter under advisement and requested that counsel send her proposed orders. App. 51, ll. 1-3.

Judge Harrington retired from the bench on June 30, 2018. While it is unclear if proposed orders were ever sent to Judge Harrington for consideration, the record reflects that the

¹ Counsel for Petitioner has confirmed with the Attorney General's Office that the transcript of Petitioner's partial trial has never been ordered, is not in existence, and was not before the PCR court.

order of dismissal that was eventually signed was prepared in 2017² while Judge Harrington was still an active member of the bench. App. 59. Importantly, Judge Harrington did not make any oral rulings or factual findings during the PCR hearing.

An order of dismissal was eventually signed by the Honorable Edgar Dickson on April 3, 2020, almost two years and four months after Petitioner's PCR hearing had been held. App. 53-59. Even though Judge Dickson did not preside over the PCR hearing, the order of dismissal he signed contained witness credibility findings, along with findings of fact and conclusions of law. App. 53-59. Specifically, the order of dismissal stated,

This Court reviewed the record in its entirety, *listened* to the testimony given, and *heard* the arguments presented at the evidentiary hearing. This Court has further had the *opportunity to observe the witnesses* presented at the hearing, *closely pass upon their credibility* and weigh their testimony according. *This Court finds Counsel's testimony was credible and persuasive.* Therefore, this Court dismisses Applicant's application for the reasons set out below.

App. 55 (emphasis added).

According to an e-mail provided by the State, Judge Dickson was provided with the transcript of Petitioner's PCR hearing, along with the order of dismissal, on December 4, 2019. App. 53. The e-mail does not discuss whether Judge Dickson was provided with the plea transcript or any of the other records in the case. Additionally, the record is devoid of any attempt to comply with the requirements of Rule 63, SCRCF.

² The last line of the order of dismissal shows that the original year of 2017 was written over and changed to 2020. App. 60.

ARGUMENT

The PCR judge erred in signing the order of dismissal that made findings of fact, conclusions of law, and credibility determinations where the judge was a successor judge who did not preside over the PCR hearing and did not comply with the requirements of Rule 63, SCRPC, prior to signing the order.

Judge Harrington presided over Petitioner's original PCR hearing. Six months after Petitioner's PCR hearing, Judge Harrington retired from the bench without ever issuing an order in Petitioner's case. Nearly two and a half years after Petitioner's PCR hearing a successor judge improperly signed an order of dismissal which contained credibility findings. Further, the successor judge never certified familiarity with the record and the parties were not given an opportunity to request the recall of any of the PCR witnesses. Based on Rule 63, SCRPC, and the interpretation of that rule in both state and federal courts, Petitioner is entitled to a new PCR hearing.

The appellate courts of this state have yet to consider the impact of Rule 63, SCRPC, on an order arising from a PCR hearing. However, federal case law interpreting the rule and state case law interpreting the rule as it was written prior to 2004 are instructive. Prior to the 2004 amendment, Rule 63 SCRPC, provided:

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then the resident judge of the circuit or any other judge having jurisdiction in the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

The South Carolina appellate courts addressed then Rule 63 in Christy v. Christy, 347 S.C. 503, 556 S.E.2d 701 (Ct. App. 2001), *aff'd as modified*, 354 S.C. 203, 580 S.E.2d 444

(2003). In Christy, following the dissolution of the parties' marriage, former husband filed an action to terminate or reduce spousal support alleging both that former wife had entered a common law marriage and that he had changes in his financial circumstances. Id. at 505-06, 556 S.E.2d at 702. Wife filed a counterclaim to increase support. Id. The family court bifurcated the issues and a bench trial was held on the common law marriage claim. The original judge made no oral rulings or findings during the bench trial. Id. Subsequently, the family court judge who heard the common law marriage evidence became incapacitated before signing an order. Id. A successor judge denied husband's motion for a new trial pursuant to Rule 63, SCRCF, and later signed an order, based in part on a draft order submitted to the original judge, finding no common law marriage. Id. at 506-07; 566 S.E.2d at 703.

In analyzing the application of then Rule 63, SCRCF, the Court of Appeals engaged in a thorough analysis of applicable state and federal law. The Court of Appeals noted that federal courts had unanimously read into Rule 63 the negative inference "that if the presiding judge in a civil case dies or becomes disabled before the rendering of a verdict or before the judge issues his findings of fact and conclusions of law, a successor judge must retry the case." Id. at 509, 556 S.E.2d at 704 (citing Townsend v. Gray Line Bus Co., 767 F.2d 11, 17-18 (1st Cir. 1985); Arrow-Hart, Inc. v. Philip Carey Co., 552 F.2d 711, 713 (6th Cir. 1977); Emerson Elec. Co. v. Gen. Elec. Co., 846 F.2d 1324, 1325-26 (11th Cir. 1988)).

In denying husband's motion for a new trial and signing the proposed order, the successor judge relied in part on holdings in Rex Oil, Ltd. v. M/V Jacinth, 873 F.2d 82 (5th Cir.1989) and The Del-Mar-Va, 56 F. Supp. 743 (D.Va.1944). Id. at 510, 556 S.E.2d at 704. In both of those cases the successor judge denied a request for a new trial under Rule 63. Id. at 510-11, 556 S.E.2d at 704-05. On appeal, it was held that although the original judges in Rex

Oil and Del-Mar-Va had not filed written orders prior to their deaths, they had made extensive findings of fact and conclusions of law on the record sufficient to support the successor judge's decision to enter a judgment based on the record. Id. at 512, 566 S.E.2d at 705. The Court of Appeals distinguished these cases from the situation it was analyzing in Christy, finding that the original judge in Christy had not made any findings of fact or conclusions of law on the record that the successor judge could have relied upon. Id.

Additionally, the Court of Appeals acknowledged that two exceptions had developed to the general operation of Rule 63. The Court of Appeals wrote:

First, if all parties consent, a successor judge may make findings of fact and conclusions of law based on the trial transcript. Second, the successor judge may consider the trial transcript as akin to "supporting affidavits" for summary judgment purposes and render judgment *if no credibility determinations are required*. Emerson Elec. Co. v. Gen. Elec. Co., 846 F.2d 1324, 1326 (11th Cir.1988). *Absent consent of the parties, a successor judge cannot make credibility determinations.* Id.; see also Whalen v. Ford Motor Credit Co., 684 F.2d 272, 274 (4th Cir.1982) (finding Rule 63 communicates a positive prohibition on substitution of a judge prior to verdict where all parties have not stipulated their consent).

Christy at 512, 556 S.E.2d at 705 (emphasis added).

Applying the law to the facts of the case in Christy, the Court of Appeals held that the successor judge erred in denying husband's motion for a new trial following the incapacity of the original judge. Id. at 512, 566 S.E.2d at 705-06. The Court of Appeals held that where the successor judge did not review the transcript, where there was nothing in the record containing finds of fact and conclusions of law made by the original judge, and where the order relied on credibility determinations, the successor judge could not enter an order on the record unless the parties stipulated to the record and consented to the successor judge making such determinations. Id. The order was vacated, and the case remanded for a new trial on the common law marriage issue.

When the South Carolina Supreme Court reviewed the case, it stated:

Rule 63, SCRCPP, by its terms governs those situations where the trial judge becomes incapacitated or dies after the filing of his findings of fact and conclusions of law, but prior to the completion of post-trial acts authorized by the SCRCPP. *As the Court of Appeals found, other jurisdictions having our version of Rule 63 have derived a 'negative inference' from the language of the rule, and concluded that a new trial is mandated where, as here, the incapacity or death precedes the filing of an order. While we find no error in the Court of Appeals' analysis of the rule, nor in its suggestion that two exceptions adopted by other jurisdictions would be applicable under the appropriate circumstances, we hold that this case is governed not by any negative inference derived from Rule 63, but rather by another principle of state law.*

Christy v. Christy, 354 S.C. 203, 205–06, 580 S.E.2d 444, 446 (2003) (emphasis added).

The Supreme Court held that a new trial was required under the common law principal that “[u]ntil the paper has been delivered by the judge to the clerk of court, to be filed by him as an order in the case, it is subject to the control of the judge, and may be withdrawn at any time before such delivery.” Id. (citing Archer v. Long, 46 S.C. 292, 24 S.E. 83 (1896); see also e.g., Bowman v. Richland Mem. Hosp., 335 S.C. 88, 515 S.E.2d 259 (Ct.App.1999) (citing Archer v. Long); compare Rule 58(a), SCRCPP (“A judgment is effective only when ... entered on the record”); see also Ford v. State Ethics Comm'n, 344 S.C. 642, 545 S.E.2d 821 (2001) (“Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling”)).

Since the holding in Christy, Rule 63, SCRCPP, has been amended to conform to the requirements set out in Rule 63 of the Federal Rules of Civil Procedure. Currently the rule provides:

If at any time after a trial or hearing has been commenced, but before the final order or judgment has been issued, the judge is unable to proceed, a successor judge shall be assigned. *The successor judge may proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge shall, at the request of a party, recall any witness whose*

testimony is material and disputed and who is available to testify without undue burden. A successor judge may also provide for the recall of any witnesses.”

Rule 63, SCRCPP (emphasis added).

While the appellate courts of this state have not considered the current version of Rule 63, SCRCPP, in a published³ opinion, numerous federal courts have interpreted the rule. As stated in Mergentime Corp. v. Washington Metropolitan Area Transit Authority, 166 F.3d 1257, 1262 (D.C. Cir. 1999), “balancing efficiency and fairness, the new rule thus allows successor judges to avoid retrial, but only to the extent they ensure that they can stand in the shoes of the predecessor by determining that “the case may be completed without prejudice to the parties.”” Importantly, the exceptions noted by the South Carolina Court of Appeals to the old Rule 63, have been held to apply to the current version of the rule.

In Henry A. Knott, Co. v. Chesapeake & Potomac Telephone Co. of West Virginia, 772 F.2d. 78 (4th Cir. 1985) the United States Court of Appeals for the Fourth Circuit held that “a successor judge simply cannot make credibility determinations based upon the record. A hearing de novo before a new successor master or before the district court *must be conducted if the case requires the trier of fact to make credibility determinations concerning the testimony of witnesses*; otherwise the parties right to a full due process hearing would be severely undercut.” Id. at 85 (emphasis added).

A significant amount of federal jurisprudence supports the proposition that a successor judge must grant a new hearing where the trier of fact is required to make credibility determinations. See Patelco Credit Union v. Sahni, 262 F.3d 897 (9th Cir. 2001) (stating that the successor judge may examine the trial transcript as if it were ‘supporting affidavits’ for summary

³ The only South Carolina case addressing current Rule 63, SCRCPP, is Hammer v. Hammer, 2008 WL 9881724.

judgment purposes and enter summary judgment if no credibility determinations are required); see also Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593, 601 (7th Cir.1996) (suggesting that on remand successor judge could decide the case on the existing record if credibility determinations were unnecessary); Emerson Elec. Co. v. Gen. Elec. Co., 846 F.2d 1324, 1326 (11th Cir.1988) (holding when a judge has yet to make findings of fact and conclusions of law, a successor judge must retry the case unless all parties consent to resolution based on the trial transcript or summary judgment would be appropriate (i.e., the trial transcript is treated as “supporting affidavits” and no credibility determinations are required for decision)); In re Schoenfield, 608 F.2d 930, 935 (2d Cir.1979) (stating the principle that the factfinder who is given the opportunity to observe witnesses as they testify is in a better position to make factual findings based on that evidence than is the factfinder who is restricted to a written record of the same testimony and affirming grant of new trial because credibility was at issue).

In the present case Judge Harrington presided over Petitioner’s PCR hearing. At no point during the hearing did Judge Harrington make any oral rulings regarding credibility findings, factual findings, or conclusions of law that a successor judge could potentially rely upon. Additionally, Judge Harrington failed to issue a written order containing the required findings of fact and conclusions of law required by S.C. Code §17-27-80 prior to her retirement. Therefore, as the case had commenced, but no final order or judgment had been issued, Rule 63, SCRCF, required that a successor judge be appointed. The successor judge was then required to comport with the requirements of the rule to certify familiarity with the record, determine possible prejudice to the parties, and recall witnesses as necessary. This did not happen in Petitioner’s case.

While Judge Dickson received the PCR transcript prior to signing the order of dismissal, there is no evidence that he *certified familiarity with all the transcripts and filings* in Petitioner's case as required by Rule 63, SCRCF. The e-mail provided by the State only confirms that Judge Dickson had the PCR transcript in his possession. Absent from the e-mail, but referenced in the order of dismissal, are the plea transcript, clerk of court records regarding Petitioner's conviction, Petitioner's records from SCDC, and the pleadings in the case. To begin to comport with Rule 63, SCRCF, the successor judge needed to certify familiarity with all of these documents, in a manner that made clear he had indeed reviewed the record in full, prior to issuing a ruling.

The failure to follow the strictures of Rule 63, SCRCF, was especially troublesome in Petitioner's case as the PCR hearing hinged on witness credibility. The order stated that "Counsel's testimony was credible and persuasive" and that "the credible testimony" supported dismissing Petitioner's claim of an involuntary guilty plea. App. 56-57. However, there was no way for the successor judge to have made these crucial credibility determinations based upon the written record.

Credibility findings are extremely important in the PCR setting especially considering that the appellate courts give great deference to a PCR court's credibility findings because *appellate court's lack the opportunity to directly observe the witnesses*. See Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). It is essential that the judge who signs an order in a PCR action be the judge who observed the witnesses during the hearing because absent consent of the parties, a successor judge cannot make credibility determinations. Emerson Elec. Co. v. Gen. Elec. Co., 846 F.2d 1324, 1326 (11th Cir. 1988). If the original judge is no longer

available, then the requirements of Rule 63, SCRCPP, must be met. If those requirements are not met, or cannot be met, then a new hearing is required.

Notably, the two exceptions to Rule 63, SCRCPP, recognized by the appellate courts of this state in Christy, *supra*, do not apply in Petitioner's case. Had the successor judge certified familiarity with the record and determined that the proceedings could be completed without prejudice to the parties then with the consent of the parties the successor judge could have made findings of fact and conclusions of law based on the plea and PCR transcripts. However, there is no evidence in the record that the successor judge took those necessary steps nor that the parties consented to the successor judge making such findings. Additionally, there is nothing in the record showing the parties consented to the successor judge making the credibility determinations that are in the order of dismissal.

A fair reading of the records shows that Rule 63, SCRCPP, was not complied with in this case. The successor judge did not certify familiarity with the record and did not determine if the proceedings could be completed without prejudice to the parties. Furthermore, the successor judge improperly made credibility findings without the consent of the parties and without having the ability to observe the witnesses live testimony. These errors cannot be cured. Petitioner is entitled to a new PCR hearing.

CONCLUSION

Based on the forgoing, this Court should remand this case for a new PCR hearing.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of April, 2021.