

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge

ADRIENNE RANDOLPH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000788

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Petitioner's argument is preserved for review because the successor judge did not certify familiarity with the record nor determine whether the proceedings could be completed without prejudice to the parties prior to entering a judgment and where there are extraordinary circumstances in this case that would excuse any alleged procedural default. Additionally, the credibility findings were necessary to the determination of the case and therefore could not be made based on the record absent consent of the parties.

Respondent contends that Petitioner's argument regarding the propriety of a successor judge signing an order of dismissal which contained credibility findings is not preserved for appellate review. However, Respondent's argument fails on three fronts. First, a party is not directed or required to act under Rule 63, SCRCF, **until** the successor judge certifies familiarity with the record. Second, a motion pursuant to Rule 59(e), SCRCF, would not be the proper avenue to challenge whether a successor judge complied with Rule 63, SCRCF. Finally, any alleged procedural default would be excused due to the extraordinary circumstances of this case.

“As a general rule, due process considerations require that a party in a case tried without a jury is entitled to a decision by the judge who heard the evidence.” 84 A.L.R.5th 399 (Originally published in 2000). This is because the judge who heard the evidence is also the judge who observed the witnesses testify and is thus properly situated to determine their credibility. Rule 63 acts to protect that due process right by setting out certain technical requirements that a successor judge must meet before continuing with the case. As the Advisory Committee Notes from the 1991 amendment to the Federal Rule 63, “[t]o avoid the injustice that may result if the substitute judge proceeds despite unfamiliarity with the action, the new rule

provides, that the successor judge must certify familiarity with the record and determine that the case may be completed before that judge without prejudice to the parties.”

Rule 63, SCRCF, states “[t]he successor judge **may proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties...**” (emphasis added). Accordingly, the plain language of Rule 63, SCRCF, allows a successor judge to proceed with a case **only** after the judge has met two technical requirements. First, the judge must certify familiarity with the record. Second, the judge must determine whether the proceedings may be completed without prejudice to the parties. Not until a successor judge has taken these two specific actions can a party request the recall of witnesses or object to the successor judge deciding the matter. The federal courts offer guidance on this point.

In re: Tri-State Financial, LLC, 519 B.R. 759 (B.A.P. 8th Cir. 2014), involved multiparty cross-appeals of a judgment entered by a successor judge after the original bankruptcy judge retired from the bench. Only one party, American Interstate Bank, argued on appeal that the successor judge did not comply with Rule 63, FRCP¹. Id. at 765-66. The Bankruptcy Appellate Panel for the Eight Circuit agreed with American Interstate and held that the successor judge had violated Rule 63 when the successor judge entered judgment **without first** certifying familiarity with the record and determining the case could be completed without prejudice to the parties. Id. at 766 (emphasis added). The panel held,

The bankruptcy court’s familiarity with the record is abundantly demonstrated by its detailed recitation of the facts in its decision. However, **without the requisite certification, there is no suggestion that the parties had any reason to believe a decision was imminent and the time within which**

¹ Rule 63, FRCP, applies to actions in the bankruptcy court pursuant to the Federal Rules of Bankruptcy Procedure Rule 9028 which states “Rule 63 F.R.Civ.P. applies in cases under the Code.”

they might exercise their right under Rule 63 and Rule 9028 to ask the bankruptcy court to recall witnesses whose testimony was material and disputed was passing.

Id. (emphasis added).

In reaching the holding, the panel also considered the question of preservation. The panel noted that the Court of Appeals for the Eight Circuit had held in Littleton v. Pilot Travel Centers, LLC that a party who does not make a Rule 63 request to recall witnesses “has no right to sit back and await decision of the case before objecting to the procedure.” Id. at 767 citing Littleton 568 F.3d 641, 648 (8th Cir.2009) (internal citations omitted). However, the panel found that the opinion in Littleton did not state whether the judge had made the requisite certification and thus was distinguishable from the matter before it. The panel wrote,

In any event, in this case, American Interstate cannot be said to have sat back and awaited a decision before objecting to the procedure, because, as noted above, **there is no suggestion the parties had any reason to believe a decision was imminent. There is likewise no suggestion there was any “procedure” to which American Interstate might have objected. The bankruptcy court simply entered its judgment, at which point it was too late for American Interstate—or any other party—to object.**

Id. at 767 (emphasis added).

Respondent argued that the successor judge in Petitioner’s case certified familiarity with the record because the order of dismissal, which was initialed on each page by the judge, contained language stating the court had reviewed the pleadings, plea transcript, and testimony from the evidentiary hearing. Return to Cert. pg. 9. However, the holding in Tri-State Financial coupled with the plain unambiguous language of Rule 63 makes it abundantly clear that certification of familiarity with the record must come **before** a judgment is entered so that the parties may then exercise their rights under Rule 63.

Respondent has conflated the successor judge's review of the order of dismissal with the successor judge's duty to certify familiarity with the record and determine whether the proceedings may be completed without prejudice to the parties prior to entering a judgment. The successor judge in Petitioner's case did not, in any manner, certify familiarity with the record prior to entering judgment. Nevertheless, even if this Court construed the successor judge's initialing of each page of the order as certifying familiarity with the record, this alleged certification would have happened **at the time of judgment**, instead of before, which would not allow the parties to exercise their rights under Rule 63, SCRCF, and would therefore not comport with the requirements of Rule 63.

In the present matter, the record is devoid of evidence that the successor judge certified familiarity with the record prior to entering a judgment. One sentence in an order of dismissal written two and a half years before it was signed does not satisfy the technical requirements of Rule 63, SCRCF. Like the parties in Tri-State Financial, *supra*, Petitioner had no reason to believe a decision was imminent, given the fact that the case had been pending for almost two and a half years. Additionally, there was no procedure for either party to object to the reassigning of the successor judge or to request that witnesses be recalled as the entire, one-sided exchange occurred informally, over e-mail.

In arguing that Petitioner has waived her right to raise this issue now, Respondent relies heavily on the fact that the successor judge was sent an e-mail and Petitioner's counsel was copied² on the message. However, much like *American Interstate*, there was no procedure by which Petitioner could have objected, as the entire process occurred informally, outside of a

² The fact that opposing counsel was copied on the email to the successor judge's chambers is of little import as failure to include opposing counsel on the e-mail would run afoul of the prohibition against *ex parte* communications.

court room, via one-sided electronic communication. Additionally, Petitioner had been waiting over two years for a decision and had no reason to believe that one was imminent simply because the judge's secretary was sent an e-mail containing the PCR transcript and a proposed order of dismissal.

Respondent also asserted that Petitioner has waived this argument because she did not file a Rule 59(e). Respondent's argument misunderstands the purpose of a Rule 59(e) motion. When an order of dismissal fails to contain findings of fact and conclusions of law on every issue raised before the PCR court, a Rule 59(e) motion is required. In any instance where the **substance** of the judgment is being challenged, a Rule 59(e) motion is required. Petitioner is not challenging the substance of the order in her case; she is challenging the **existence** of the order. The question before the Court is whether the order of dismissal should have been signed, not whether the contents of the order as they pertain to the underlying PCR claims were appropriately addressed. Thus, a Rule 59(e) motion would not be the proper mechanism through which to raise this issue.

Respondent next argued that there were no extraordinary circumstances that would excuse a procedural default in Petitioner's case. Respectfully, Petitioner's case is replete with extraordinary circumstances that would excuse any perceived or actual procedural default. First, the delay in having the order signed by the original hearing judge cannot be placed at the feet of Petitioner. The original judge requested proposed orders and the record shows that the Attorney General's Office, at a minimum, prepared the eventually signed proposed order while the original judge was still on the bench in 2017. The failure of that office to obtain a signed order prior the judge's retirement some six months after Petitioner's hearing cannot be faulted to Petitioner.

Second, Petitioner was never given notice nor a meaningful opportunity to be heard on the issue of the successor judge as the entire exchange occurred over e-mail. “Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. Fundamentally, due process requires notice, a meaningful opportunity to be heard, and judicial review.” Thompson v. State, 415 S.C. 560, 566, 785 S.E.2d 189, 192 (2016) (internal quotations and citations omitted). Petitioner had a due process right to have her non-jury case heard and decided by a single judge. It would be fundamentally unfair to bar Petitioner from raising this issue now, when it is the first time that she has had a **meaningful** opportunity to be heard. Additionally, “[t]he right to have a decision made by the trial judge who presided over the entire matter is so basic and fundamental that it is not waived by the failure of counsel to object at the time of the hearing.” Michel v. Michel, 31 A.D.2d 313, 316, 297 N.Y.S.2d 250, 253 (1969).

Admittedly, a litigant can waive a right implicated by due process. However, “[t]here is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was ‘an intentional relinquishment or abandonment of a known right or privilege.’” Brookhart v. Janis, 384 U.S. 1, 4, 86 S. Ct. 1245, 1247, 16 L. Ed. 2d 314 (1966) (internal citations omitted). There is nothing in the record that evidences an “intentional relinquishment or abandonment” of a known right by Petitioner.

Lastly, Respondent asserted that the successor PCR court did not violate Rule 63 because the successor judge did not base its decision entirely on the credibility of the witnesses. Return to Pet. pg. 11. Inherent in that statement is that the successor judge based its decision **at least in part on credibility findings**. The significant amount of case law on this point is clear: if any

credibility findings are needed to render a decision, then the successor judge must grant a new trial or acquire the consent of the parties to proceed forward on the written record. See Patelco Credit Union v. Sahni, 262 F.3d 897 (9th Cir. 2001) see also Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593, 601 (7th Cir.1996) Emerson Elec. Co. v. Gen. Elec. Co., 846 F.2d 1324, 1326 (11th Cir.1988) In re Schoenfield, 608 F.2d 930, 935 (2d Cir.1979). That simply did not happen in Petitioner's case.

Additionally, Respondent's reliance on a sentence in Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999), which states that the appellate courts give no deference to the PCR Court's credibility findings of *trial* witnesses is misplaced. Return to Cert. pg. 11. As this Court stated in Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2007),

While we defer to the PCR court's credibility findings as to witnesses who testified before the PCR court, we do not defer to the PCR court's credibility findings as to witnesses who did not testify before the PCR court. The PCR court reviewing the trial transcript is in no better position than we are to determine the credibility of trial witnesses or otherwise assess the strength of the State's case; consequently, we give no deference to the PCR court's credibility findings when we review the testimony of such witnesses.

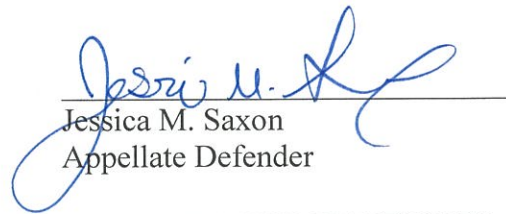
Thompson at 247, 814 S.E.2d at 493 (internal citations omitted) (emphasis added). Again, this Court made clear that credibility determinations by the judge of the witnesses who testified at the PCR hearing are integral to determining a PCR action and as such are afforded great deference on appeal. That credibility determinations are not only necessary but important in PCR actions. It weighs strongly against a successor judge signing an order of dismissal when that judge did not observe the witnesses nor obtain the parties consent. As the Advisory Committee Notes from the 1991 amendemnt of the federal version of Rule 63, "the court would risk error to determine the credibility of a witness not seen or hear who is available to be recalled." Cf. Anderson v.

City of Bessemer City NC, 470 U.S. 564, 575 (1985); Marshall v. Jerrico Inc., 466 U.S. 238, 242 (1980).

The strictures of Rule 63 were not met in Petitioner's case. The judge did not certify familiarity with the record and determine that the proceedings could be completed without prejudice to the parties prior to issuing his ruling. Instead, the successor judge improperly made credibility findings without having observed the witnesses and without the consent of the parties. Additionally, due to the informal "procedural" process used by Respondent to obtain the signed order of dismissal, Petitioner's due process rights were violated, as she was not given adequate notice that a decision was coming, nor given any meaningful opportunity to be heard on the matter.

CONCLUSION

Based on the arguments contained above, as well as those in the original Petition for Writ of Certiorari, Petitioner respectfully requests that this Court remand her case for a new PCR hearing. In the alternative, Petitioner respectfully requests that this Court grant her petition to allow for full briefing of the issue.


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This 2nd day of September 2021.