

FILED

STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON )

COURT OF GENERAL SESSIONS  
IN THE ELEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA )  
LISA M. COMER )  
CLERK OF COURT )  
LEXINGTON, SC )

CASE NO.: 2011-GS-32-01037

RESPONDENT )

(Appellate Case No. 2018-000366)

v. )

ORDER

SHELLIE DAVIS, )

RECEIVED

APPELLANT )

NOV 12 2021

SC Court of Appeals

This matter comes before the Court by way of an Order filed in the South Carolina Court of Appeals on January 24, 2019. The Court of Appeals, following a motion filed by Ms. Davis' appellate counsel, remanded this case to the Lexington County Court of General Sessions for reconstruction. An in-person hearing was conducted in this matter on September 30, 2021, wherein Taylor Gilliam, Esquire, appeared on behalf of the Defendant and Josh Edwards, Esquire, appeared on behalf of the State. Prior the hearing, the parties submitted substantive memoranda of law in support of their respective arguments, and subsequently submitted proposed orders for consideration by this Court.

**Procedural History**

Ms. Davis was indicted by a Lexington County Grand Jury in May of 2011 on one count of Murder. A jury trial was held before the the Honorable Thomas A. Russo on April 21, 2014. Aimee J. Zmroczek and M. Wade Dowtin represented Ms. Davis, and C. Dayton Riddle, III and Shannon A. Davis appeared on behalf of the State. Prior to trial, Ms. Zmroczek filed a written notice pursuant to S.C. Code Ann. § 17-23-170(E), which indicated her intent to offer evidence of battered spouse syndrome at trial.

A TRUE COPY

*[Signature]*  
CLERK OF COURT, C.P., G.S. & F.C.

Following a five-day trial, the jury found her guilty as indicted. Sentencing was deferred to the following week. On April 30, 2014, Judge Russo convened a sentencing hearing, wherein he denied Ms. Zmroczek's request to convey "battered spouse" status upon Ms. Davis in accordance with S.C. Code Ann. § 16-25-90. Judge Russo did not issue a written order of his findings and the transcript of that sentencing hearing cannot be produced.

Ms. Zmroczek filed a post-trial motion to reconsider Judge Russo's finding regarding battered spouse syndrome on May 8, 2014. For unknown reasons to this court, the Order denying this motion was not filed until February 7, 2018.

Following receipt of that Order, a Notice of Appeal was filed with the South Carolina Court of Appeals on February 28, 2018. Previous appellate counsel for Ms. Davis, Jennifer Roberts, filed a Petition with the South Carolina Court of Appeals on December 6, 2018 that sought an order remanding the case for reconstruction. The Court of Appeals requested a Return from the State; a Return was filed on December 12, 2018. The state did not oppose the Petition.

Accordingly, the Court of Appeals issued the aforementioned Order granting the motion to remand on January 24, 2019. Counsel for the parties have been diligent in their efforts to reconstruct this case. They contacted Judge Russo in early 2020<sup>1</sup> and then Judge Addy, who served as Chief Administrative Judge at that time. A conference call occurred with Judge Addy, appellate counsel Taylor Gilliam, and counsel from the Attorney General's Office, Caroline Scrantom, on November 19, 2020.

A follow-up status conference call took place between the Court and the same counsel on January 7, 2021. The Court and the parties noted that reconstruction of this matter would be difficult given the significant time lapse and recommended that the parties initially gather

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<sup>1</sup> Judge Russo's term as a circuit judge ended on June 30, 2020.

affidavits from trial participants and witnesses with personal knowledge of the trial and sentencing hearing conducted in 2014. To that end, six affidavits were gathered from attorneys, Ms. Davis, a family member, and an expert witness. This court subsequently scheduled a hearing for the parties to the fully heard on the respective arguments regarding the reconstruction of the record of this case.

### **AFFIDAVITS OBTAINED IN RECONSTRUCTION**

Affidavits were collected from January – March 2021. Each of the sworn affidavits were made exhibits to the record at the reconstruction hearing on September 30, 2021 and can be summarized as follows:

#### **Shellie Davis**

Ms. Davis retained Aimee Zmroczek after she was indicted. She remembered that her trial began on April 21, 2014 before Judge Russo. Ms. Davis recalled that the defense strategy at trial was to show that Shellie Davis acted in self-defense. She noted that she testified in her own defense. As can be seen in the trial transcript, Judge Russo initially agreed that Ms. Davis was a battered woman.<sup>2</sup> After the solicitor objected, Ms. Davis recalled Judge Russo instructing the parties that he had not previously had a battered spouse case<sup>3</sup>, and he desired to research the issue. She was unable to recollect anything specific about the sentencing hearing the week after her trial in 2014.

#### **Marquis Davis**

Mr. Davis is Ms. Davis' oldest son. He remembered attending every day of his mother's trial. At the time, he was enrolled at the University of South Carolina as a freshman and noted that April 2014 was a very stressful time in his life. He had no specific recollections regarding the

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<sup>2</sup> Trial transcript p. 924, ll. 5 – 16.

<sup>3</sup> Trial transcript p. 933, ll. 2 – 8.

sentencing hearing. He recalled addressing the judge and requesting leniency for his mother. Those remarks do not appear in the trial transcript from April 21 – 25, 2014.

Aimee Zmroczek, Esquire

Ms. Zmroczek has been practicing law since 2008. She was retained to represent Ms. Davis. She noted that Judge Russo found by a preponderance of the evidence that Ms. Davis was a battered woman after the jury returned a guilty verdict. The trial transcript accurately reflects this assertion. Ms. Zmroczek recalled that Judge Russo reconvened the parties and witnesses for a hearing on April 30, 2014. She had no specific recollections of the sentencing, nor could she recall who testified. She did not retain any notes from the sentencing hearing.

William M. Tyson, Ph.D.

Dr. Tyson is a licensed psychologist. He earned his M.S. degree in Clinical Psychology in 1982. He earned his Ph.D. in Clinical Psychology a few years later. He was contacted by Ms. Zmroczek in April 2014 about testifying in Ms. Davis' case. He recalled that on "April 30, 2014, I testified at Ms. Davis' trial." He was unable to remember much of the specific details of his testimony. He could not recall what questions were asked of him or whether any documents or exhibits were discussed at the hearing.<sup>4</sup>

C. Dayton Riddle, Esquire

Mr. Riddle was the Deputy Solicitor in Lexington County in 2014. Along with Shannon Davis, he prosecuted this case. Based on his recollection, neither party called any witnesses to deliver testimony regarding battered spouse syndrome at the sentencing hearing. Further, Mr.

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<sup>4</sup> The records reflect that Ms. Davis was convicted on April 25, 2014, and that the sentencing hearing occurred on April 30, 2014. Dr. Tyson's affidavit refers to his testimony at trial, but references the date of the sentencing hearing. None of the affiants appear to recall Dr. Tyson testifying at a post-trial sentencing hearing.

Riddle recalls that “the only evidence presented to the trial court on the applicability of the battered spouse statute . . . was presented during Ms. Davis’ trial.”

Shannon Davis, Esquire

Ms. Davis was an Assistant Solicitor in the 11th Judicial Circuit in 2014. From what she could recall, she did not believe Ms. Zmroczek called any witnesses for the purposes of the sentencing hearing convened subsequent to the trial. Further, Ms. Davis recalled: “During Ms. Davis’ case-in-chief, Ms. Zmroczek called Ms. Davis and a few of Ms. Davis’ friends. These witnesses discussed the issue of abuse during their testimonies. Ms. Zmroczek also called Dr. Donna Schwartz-Watts Maddox who was retained to examine and evaluate Ms. Davis, and Dr. William Tyson, who discussed battered women’s syndrome and who did not offer an opinion on whether Ms. Davis suffered from battered women’s syndrome.”

**Findings of Fact and Conclusions of Law**

This Court has had the opportunity to review the above affidavits and heard the arguments of counsel. Set forth below are the relevant findings of fact and conclusions of law regarding the reconstruction of Ms. Davis’ April 30, 2014 sentencing hearing.

Discretion in determining how to proceed with a reconstruction of an unavailable transcript lies with the trial court. Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9, 13 (Ct. App. 2012). This Court acknowledges that a reconstruction hearing will never be so effective as to provide a verbatim recreation of every question and response elicited during the original hearing. When a transcript has been lost or destroyed, an appellate court may remand to have the record reconstructed so as to allow for meaningful appellate review. Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002); 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). Where portions of stenographic notes are lost prior to transcription, it is appropriate for the judge to accept affidavits of counsel and the court reporter to determine what transpired. China v. Parrott, 251 S.C. 329, 333-34, 162 S.E.2d 276, 278 (1968).

A reconstructed record on appeal should allow for “meaningful appellate review.” State v. Ladson, *supra*. It is important to note that, the inability to prepare a complete transcript, in and of itself, does not necessarily present a ground for reversal. State v. Ladson, 373 S.C. 320, 325, 644 S.E.2d 271, 273-274 (Ct. App. 2007). The trial court has discretion in determining how to reconstruct missing portions of a transcript, so long as this discretion is within the limits required by procedural due process. Adams v. H.R. Allen, Inc., 397 S.C. 652, 658, 726 S.E.2d 9, 13 (Ct. App. 2012). The burden is on the appellant to establish that the “incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review. In re D.W., 615 S.E.2d 90, 94 (2005).

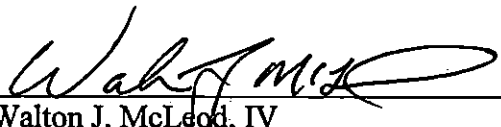
Here, The Court of Appeals ordered this Court to schedule “such hearings [this Court] deems appropriate,” to determine whether a record of the sentencing hearing could be adequately reconstructed. Upon review of the affidavits collected during the reconstruction phase, there is conflicting remembrance of what, if any, testimony was provided at the sentencing hearing. The affidavits collected for the record in this remand can arguably be used to support both of the parties respective arguments regarding “meaningful appellate review.”

In considering a request for early parole eligibility under S.C. Code Ann. § 16-25-90, the circuit court “must make specific findings of fact” on record. State v. Blackwell-Selim, 392 S.C. 1, 4, 707 S.E.2d 426, 428 (2011). The state contends that its two witnesses recall no live testimony at the sentencing hearing, furthermore, none of the affidavits indicate that there was any testimony

provided at the hearing. Being that the crux of the Defense's appeal regards Judge Russo's decision to deny defense counsel's request to convey "battered spouse" status upon Ms. Davis in accordance with S.C. Code Ann. § 16-25-90, it would be essential for the appellate court to review what findings of fact, if any, were made during the sentencing phase. Judge Russo did not issue a written order of his initial findings, and his subsequent Order denying reconsideration only provided that he "heard sufficient expert witness testimony for both the State and the Defendant prior to sentencing . . ." In sum, there is no record of credible evidence considered, and no specific findings of fact on record pertaining to the discretionary decision made pursuant to S.C. Code Ann. §16-25-90.

Due to the enigmatic nature of what occurred at the sentencing hearing and the ambiguity of what the trial and sentencing court weighed in consideration of his ruling, this Court finds the record of the post-trial sentencing hearing cannot be adequately reconstructed. In review of the affidavits that the parties collected at the direction of this Court, and the arguments of counsel presented at the formal hearing, it appears evident that a meaningful appellate review of the post-trial sentencing hearing is not possible.

**IT IS SO ORDERED.**

  
Walton J. McLeod, IV  
Chief Administrative Judge – General Sessions  
Eleventh Judicial Circuit

Lexington, South Carolina  
November 5, 2021