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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Courtney Clyburn-Pope, Circuit Court Judge

ARTRELL HICKSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-001262

MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, AN ORDER TO RECONSTRUCT THE RECORD OF PETITIONER'S POST-CONVICTION RELIEF HEARING

Pursuant to Rule 240 of the South Carolina Appellate Court Rules (SCACR), Petitioner respectfully requests this Court reverse his convictions and sentence and remand for a new trial. In the alternative, Petitioner moves to reconstruct of the record of the evidentiary hearing held during his first action for post-conviction relief. Without the transcript, meaningful appellate review of the denial of Petitioner's application for post-conviction relief is not possible.

In accordance with Rule 240(c), SCACR, Petitioner submits the following documents to support this motion: Indictment 2009-GS-02-02294 for armed robbery (Exhibit No. 1);

Indictment 2010-GS-02-00670 for possession of a firearm during the commission of a violent crime (Exhibit No. 2); Order of Dismissal filed January 9, 2017 (Exhibit No. 3); Applicant's Exhibits from September 11, 2015 Hearing (Exhibit No. 4); Order Granting Motion to Merge PCR Actions and Granting Belated Appellate Review of Initial PCR Action Pursuant to Austin v. State filed September 10, 2021 (Exhibit No. 5); Email chain confirming September 11, 2015 transcript cannot be transcribed (Exhibit No. 6).

Procedural History

An Aiken County grand jury indicted Petitioner in December 2009 for armed robbery and in April 2010 for possession of a firearm during the commission of a violent crime. Petitioner's case was called to trial on September 20, 2010 before the Honorable Doyet A. Early, III, and a jury. Petitioner was tried jointly with his brother and codefendant, Javier Hickson. Then Solicitor J. Strom Thurmond, Jr. and Assistant Solicitor Susanna Ringler represented the state. Kelley Brown represented Petitioner and Michael Routzong represented Javior Hickson. On September 22, 2010, the jury found Petitioner guilty as indicted. He was sentenced to twenty-eight years for armed robbery and five years concurrent for the weapons offense.

Petitioner filed a timely notice of appeal. The appeal was perfected by Jerry M. Screen. The Court of Appeals ultimately affirmed Petitioner's convictions and sentence in an unpublished opinion. State v. Hickson, 2012-UP-667 (S.C. Ct. App. filed December 19, 2012).

On May 21, 2013, Petitioner filed an application for post-conviction relief (PCR). The state filed a return to this application on July 3, 2013. An evidentiary hearing was held on September 11, 2015 before the Honorable Edgar W. Dickson. Assistant Attorney General Daniel Gourley represented the state, and Aimee Zmroczek represented Petitioner. Petitioner and his trial counsel, Kelley Brown, testified at the hearing. Two exhibits were entered in evidence:

Applicant's Exhibit No. 1 (Statement of Tommy Parker) and Applicant's Exhibit No. 2 (Statement of Charles Smalls). By order filed January 9, 2017, Judge Dickson denied Petitioner relief.

On January 19, 2017, Petitioner filed a motion to reconsider pursuant to Rule 59(e), SCRCP. The state filed a return to the motion to consider on February 6, 2017. By order filed March 17, 2017, Judge Dickson denied the motion.

Petitioner's counsel failed to file a notice of appeal from the order denying him post-conviction relief. On June 19, 2019, Petitioner filed a second PCR application seeking a belated appeal from the denial of his first application. On March 16, 2020, Petitioner filed a third PCR application again seeking a belated appeal. The state filed a return and a motion merge the two PCR actions on August 13, 2021. An evidentiary hearing was convened on September 7, 2021 before the Honorable Courtney Clyburn-Pope. Assistant Attorney General Megan Harrigan Jameson represented the state, and Nancy Fennell represented Petitioner.

By order filed September 10, 2021, Judge Clyburn-Pope granted Petitioner a belated appeal from the denial of his first application for post-conviction relief. In the same order, the judge also granted the state's motion to merge the two PCR actions.

Petitioner timely filed a notice of appeal with this Court. The Division of Appellate Defense undertook representation of Petitioner and undersigned counsel was assigned to represent Petitioner on appeal. Upon reviewing the file, undersigned counsel discovered that a transcript of the evidentiary hearing held on September 11, 2015 during Petitioner's first action for post-conviction relief cannot be transcribed because more than five years had passed from the date of the hearing and the date the transcript was first requested from the court reporter. See Rule 607(i), SCACR (requiring court reporters to retain the tapes of a proceeding for five years).

Reconstruction of the Record

The trial court has the authority to set the record for appeal. State v. Ladson, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007). "[T]he inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal." Id. (internal citations omitted). "Where a trial transcript has been lost or destroyed, a court may remand to have the record reconstructed." Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); See Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002) (holding that when a transcript has been lost or destroyed, an appellate court may remand to have the record reconstructed); China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Ladson, 373 S.C. at 325, 644 S.E.2d at 273-274; Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992).

In order for the record to be reconstructed, it must be done in a manner that provides for meaningful appellate review and complies with the constitutional guarantees of procedural due process. Ladson, 373 S.C. at 325, 644 S.E.2d at 273-274; See China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012); Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 418 S.E.2d 319 (Ct. App. 1992). The Court of Appeals has held that "the party challenging a reconstructed record on appeal [must] demonstrate prejudice flowing from an inadequate record." Ladson, 373 S.C. at 325, 644 S.E.2d at 273. "A new trial is therefore appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting meaningful appellate review." Id. at 325, 644 S.E.2d at 274 (internal quotation marks omitted).

In China, "portions of the stenographic notes of the trial proceedings were lost before they were transcribed by the court reporter." 251 S.C. at 332, 162 S.E.2d at 277. The appeal

concerned the form of a withdrawal for punitive damages. Id. The missing portions of the transcript were relevant to this issue. Id. The case was remanded to the trial judge "to settle the case for appeal." Id. at 333, 251 S.E.2d at 277-278.

In Ladson, the appellant was convicted of first degree burglary at the conclusion of a three day trial. On appeal, he learned the court reporter could not produce a transcript of his trial. Ladson, 373 S.C. at 321, 644 S.E.2d at 271. Ladson moved for a new trial. Id. The state moved to reconstruct the record. The Court of Appeals ultimately remanded the case for reconstruction. Id. The reconstruction hearing took place more than a year after the trial. Id. The Court of Appeals noted "the passage of time clearly dimmed the recall of the participants." Id. at 325, 644 S.E.2d at 274. After reviewing the transcript of the reconstruction hearing, the court emphasized, "It was clear from the outset of this hearing that reconstructing the record from scratch, after such a substantial delay, would be an uphill struggle." Id. at 321-322, 644 S.E.2d at 271-272. The court concluded meaningful appellate review was not possible where the testimony of a majority of the witnesses was in summary fashion, the information provided was conclusory, the parties had forgotten about one witness altogether, and there was a dispute whether the defendant testified. Id. at 322, 644 S.E.2d at 272.

After the reconstruction hearing, the Court of Appeals asserted it was "left with a bare bones summary of the evidence (with more remaining unknown than known) from a lengthy multiday and fact intensive trial that resulted in a non-parolable twenty-five year person term." Id. at 327, 644 S.E.2d at 274. The record before the court contained only "a few gratuitous references to generic motions and objections" without any information concerning "the context of the motions, the specific nature of the motions, and whether the challenged evidence was cumulative to other unchallenged evidence." Id. The court refused to speculate. Id. In

concluding the record was insufficient for meaningful appellate review, the court also emphasized the record "would effectively foreclose any collateral challenge through post-conviction relief or otherwise." Id. at 327, 644 S.E.2d at 275. Thus, the court concluded Ladson had demonstrated "clear prejudice." Id.

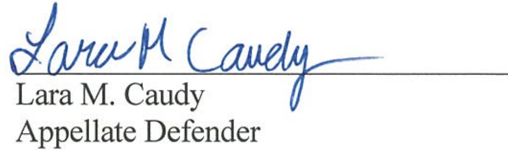
In Deaton v. Leath, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983), the defendant's convictions were set aside and a new trial had where the court reporter's equipment malfunctioned and there was no transcript of the trial court proceedings in the case from which to base an appeal. Citing Deaton, the Court of Appeals 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 the Court explained was "not a situation where the court reporter's equipment malfunctioned at trial leading to a loss of the trial transcript."

Without a transcript of the evidentiary hearing held during Petitioner's first PCR action, the record does not permit meaningful appellate review of the lower court's findings. The standard of review on appeal in a PCR case requires a determination of whether any evidence in the record supports the PCR court's decision. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The inability of the court reporter to produce a transcript is through no fault of Petitioner. Consequently, Petitioner respectfully requests this Court reverse his convictions and sentence and remand for a new trial. In the alternative, Petitioner moves to reconstruct of the record of the evidentiary hearing held on September 11, 2015 to permit meaningful appellate review of the denial of his application for post-conviction relief.

WHEREFORE, Petitioner respectfully requests this Court reverse his convictions and sentence and remand for a new trial. In the alternative, Petitioner requests this Court remand his

case to reconstruct the record of his evidentiary hearing in order to allow for meaningful appellate review of the denial of his application for post-conviction relief. While this motion is pending, Petitioner respectfully requests this Court hold the timelines for filing his petition for writ of certiorari and appendix in abeyance.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

Attorney for Petitioner

This 23rd day of February, 2022