

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Thomas A. Russo, Circuit Court Judge

RECEIVED

MAY 02 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

v.

JIMMY L. DUNCAN,

APPELLANT

PETITION FOR ORDER TO RECONSTRUCT
THE RECORD OF APPELLANT'S
TRIAL TRANSCRIPT OR IN THE ALTERNATIVE
AN ORDER SETTING ASIDE HIS CONVICTIONS
AND ORDERING A NEW TRIAL

Appellate Case No.: 2012-207966

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, undersigned counsel requests an order requiring the parties to reconstruct the record of Appellant's trial transcript held on January 31, 2012 before the Honorable Thomas A. Russo in Colleton County. In the alternative, Appellant requests an order setting aside his convictions and ordering a new trial.

In accordance with Rule 240(c), SCACR, Counsel submits the following documents to support his motion: transcript page 14 from motions hearing (Exhibit #1); certificate of court reporter (Exhibit #2); a letter dated January 31, 2012 from trial

counsel to the former Chief Appellate Defender (Exhibit #3); and notice of appeal (Exhibit #4).

Upon receipt of appointment to represent Appellant, this office requested the trial transcript. Counsel received a transcript concerning Appellant's motion to waive a jury trial. On the page fourteen, the court reporter indicated "The Court took up other matters. This case was resumed on January 31, 2012." Additionally, the following appeared: "TRANSCRIPTION NOTE: The Bench Trial cannot be transcribed as it does not appear on disc." Exhibit #1.

On the court reporter's certificate, the court reporter indicated: "The Bench Trial was not contained on the disc furnished for January 31, 2012, and cannot be transcribed." Exhibit #2.¹ Furthermore, the notice of appeal indicated the sentence was imposed on January 31, 2012. Exhibit #3. Thus, the entire trial transcript of Appellant's bench trial is missing.

Based upon a brief preliminary conversation between trial counsel and the Chief Appellate Defender Counsel, undersigned counsel believes four witnesses, including Appellant, testified at the trial.

When a trial transcript has been lost or destroyed, the Court may remand to have the record reconstructed. 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); Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); 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,

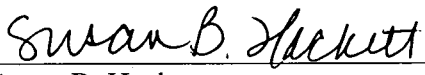
¹ Notably, the court reporter, Harriet P. Bennett, explained in her certificate that she prepared the transcript from the records of Deborah Everett. Exhibit #3.

273-274 (Ct. App. 2007). Appellant's entire trial transcript has been lost and is no longer available through no fault of Appellant. It appears the court reporter's equipment may have malfunctioned. Therefore, meaningful review of the record below is not possible with the current transcript relating only to the motion and no transcript of the actual trial. Appellant seeks reconstruction of the record to permit meaningful appellate review of his trial.

In the alternative, Appellant requests this Court set aside his conviction and sentence and remand for a new trial because the transcript fails to permit meaningful review. 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, 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." Appellant was not at fault for the absence of the entirety of his trial transcript. As a result, Appellant requests this Court order a new trial in his case.

WHEREFORE, the undersigned counsel requests an order for the reconstruction of Appellant's trial transcript in order to perfect Appellant's direct appeal in the case. In the alternative, Appellant requests this Court set aside his convictions and remand for a new trial. **While this petition is pending, Appellant asks this Court to hold the timelines for filing his initial brief and designations in abeyance.**

Respectfully submitted,



Susan B. Hackett
Appellate Defender

May 2, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

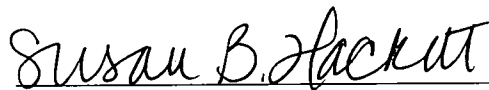
JIMMY L. DUNCAN,

APPELLANT

Appellate Case No. 2012-207966

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies the petition for order to reconstruct the record of Appellant's trial transcript or in the alternative an order setting aside his convictions and ordering a new trial in the above referenced case has been served upon Salley Elliott, Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, and Jimmy Lee Duncan#290546, Allendale Correctional Institution, P.O. Box 1151, Hwy 47, Fairfax, S.C. 29827, this 2nd day of May, 2013.



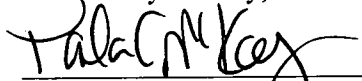
Susan B. Hackett

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me

this 2nd day of May, 2013.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.

EXHIBIT #1

1 DEFENDANT: Oh, yes, sir. I ain't trying to
2 waste nobody's time.

3 THE COURT: You're not wasting anybody's time. You
4 are absolutely -- you have the constitutional right to have
5 a trial certainly, whether it be a bench trial or a jury
6 trial.

7 So you are not wasting anybody's time.

8 So what we're going to do is we're going to set this
9 for a bench trial.

10 Now, in light of other issues I just dealt with I've
11 got a jury coming back in the morning in a forgery case,
12 and so we will set this one for the end of the forgery
13 case.

14 (The Court took up other matters. This case was re-
15 sumed on January 31, 2012.)

16 TRANSCRIPTION NOTE: The Bench Trial cannot be tran-
17 scribed as it does not appear on disc.

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EXHIBIT #2

CERTIFICATE

I, HARRIET P. BENNETT, Official Court Reporter for South Carolina Court Administration, do hereby certify that the foregoing Transcript was prepared to the best of my ability from the records of Deborah Everett, having been heard in the Court of General Sessions for Colleton County on January 30, 2012. This was a motion for a bench trial.

The Bench Trial was not contained on the disc furnished for January 31, 2012, and cannot be transcribed.

FURTHER, I certify that I am neither of kin nor counsel to any party to this matter, nor do I have any interest in the same.

April 3, 2013

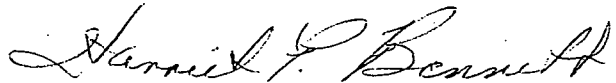


EXHIBIT #3

065

J.D. BRYAN
ATTORNEY & COUNSELOR AT LAW

STREET ADDRESS: 209 EAST WASHINGTON STREET, WALTERBORO, SOUTH CAROLINA
TELEPHONE: 843-549-9455
MAILING ADDRESS: POST OFFICE BOX 1111, WALTERBORO, S.C. 29488

Tue, Jan 31, 2012

Joe Savitz
Chief Appellate Attorney/ Division Director
S.C. Office of Appellate Defense
P.O. Box 11433
Columbia, S.C. 29211-1433

CA

FEB 2 2012

Re: State v. Jimmy Lee Duncan
Case No. 2011-GS-15-689.

Our Case No: C 294.

Dear Sir:

This is to notify you that I have filed a notice of appeal in the above case, held in Walterboro before the Honorable Thomas Anthony Russo. I was appointed by the Court to represent Mr. Duncan. Please feel free to contact me if you need any further assistance. Pursuant to the Supreme Court Rule, the hearings on the matter were as follows:

Hearing One:

1. Date of Hearing: 30 January 2012
2. Place of Hearing: Colleton County Courthouse
3. Presiding Judge: Thomas Anthony Russo
4. Name of Court Reporter: Debbie Everett, 14th Circuit Court reporter
5. Brief description of the nature of trial or hearing: Waiver of Jury hearing.

Hearing Two:

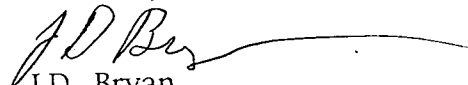
1. Date of Hearing: 31 January 2012
2. Place of Hearing: Colleton County Courthouse
3. Presiding Judge: Thomas Anthony Russo
4. Name of Court Reporter: Debbie Everett, 14th Circuit Court reporter
5. Brief description of the nature of trial or hearing: Trial for Sex Offender Registry

Please find enclosed a copy of (1) the letter to Daniel E. Shearhouse, Clerk, S.C.

Supreme Court, and (2) the notice of appeal, (3) proof of service, (4) a copy of the Order appointing me to represent the Appellant, (5) a copy of the indictment, and (6) a copy of a short brief submitted at the trial.

With highest personal regards, I remain

Sincerely,


J.D. Bryan

cc: client
clerk, S.C. Supreme Court
file

enclosures

EXHIBIT #4

2012207906

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM COLLETON COUNTY
Court of General Sessions.

Honorable Thomas Anthony Russo, Circuit Judge

POST 1-31-12
PM 1-31-12

Case No. 2011-GS-15-689.

The State of South Carolina,.....Respondent

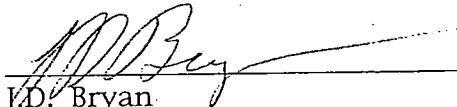
v.

Jimmy Lee DuncanAppellant.

NOTICE OF APPEAL.

Jimmy Lee Duncan appeals his conviction and sentence in this case. The sentence was imposed by the Honorable Thomas Anthony Russo on 31 January 2012.

Tue, Jan 31, 2012.


J.D. Bryan
P.O. Box 1111
209 East Washington Street.
Walterboro, S.C. 29488
(843) 549-9455

Other counsel of record are:

Charles A. Ballish
14th Judicial Circuit
PO Box 620
Walterboro, SC 29488
Attorney for the Respondent.

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FEB 01 2012

S.C. SUPREME COURT

RECEIVED

FEB 03 2012

SC Court of Appeals