

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Wilmington, Delaware 19801-3733
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August 25, 2010

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Tyreese Hawthorne
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Smyrna, Delaware 19977
Pro Se

Re: State of Delaware v. Tyreese Hawthorne
I.D. No. 0704004328

Dear Mr. Hawthorne, Ms. Chapman, and Mr. Veith:

In March 2008, a jury found Defendant, Tyreese Hawthorne, guilty of Kidnapping First Degree, Burglary Second Degree (two counts), Robbery First Degree (two counts) Robbery Second Degree, Assault Second Degree and multiple firearms offenses associated with these crimes. Defendant was sentenced to twenty-eight years of Level V incarceration. These convictions were affirmed by the Delaware Supreme Court in March 2009.¹

On February 23, 2010, Defendant filed the instant motion for postconviction relief. Defendant alleges a litany of errors including an allegation that he was improperly represented at trial. Among other claims, Defendant states that “[a]s a result of the continued incompetence displayed by trial counsel defendant motioned the Superior

¹ *Michaels v. State*, 970 A.2d 223 (Del. 2009).

Court for ‘new counsel’ on 11/20/07 . . . Superior court judge failed to investigate into defendant’s complaint or reasons behind such a request.”²

In response to Defendant’s motion, Mr. Veith and Ms. Chapman state that Defendant’s concerns about trial counsel’s performance were addressed prior to jury selection by the Court.³ Mr. Veith states in his affidavit that “I believe that the Court addressed this issue during jury selection [on February 26, 2008], so production of that relevant transcript may assist the Court in deciding this issue.”⁴ The State states in its response that “the Court addressed Hawthorne’s written request for new counsel, at which time, Hawthorne elected to continue with [Mr. Veith’s] representation.”⁵ Defendant does not deny that such a colloquy took place, but urges the Court to provide him with the transcripts of the hearing where his concerns regarding counsel were addressed.

Unfortunately, this Court, after an extensive search, cannot locate any transcript, court reporter’s notes, or audio recording of the undersigned judge’s colloquy with Defendant at which time, as this Court also recalls, Defendant expressed his satisfaction to have Mr. Veith represent him. Both Ms. Chapman and Mr. Veith also remember that Defendant was satisfied with Mr. Veith at jury selection.

The usual remedy for a lost transcript is to conduct an evidentiary hearing to reconstruct the record, if that is feasible under the circumstances. In *Love v. State*, the defendant was convicted of Unlawful Sexual Penetration.⁶ The defendant appealed to the Delaware Supreme Court and the chief court reporter for Superior Court filed an affidavit indicating that the court reporter’s trial notes for two days of the five day trial could not be located.⁷ The Supreme Court remanded the defendant’s appeal to this Court to:

- (a) Determine what portions of the court reporter’s trial notes are missing and the circumstances and explanation for such loss.
- (b) Determine whether it is possible to reconstruct the substance of any missing portion of the trial transcript through stipulation of the parties or otherwise.
- (c) Make findings concerning the significance of any missing portions of the transcript which cannot be reconstructed.⁸

Secondary authority also supports the proposition that it is appropriate to reconstruct a record that has been lost or destroyed.⁹

² Op. Br. at 3.

³ Aff. of Peter W. Veith, Esq. at ¶ 24; State’s Resp. at ¶ 3.

⁴ Aff. of Peter W. Veith, Esq. at ¶ 24.

⁵ State’s Resp. at ¶ 4.

⁶ *Love v. State*, 1991 WL 251069, at * 1 (Del. Super.).

⁷ *Id.*

⁸ *Id.*; see also *Paras v. Corr. Med. Servs.*, 2003 WL 328254 (Del. Supr.) (noting that the case had been previously remanded “to reconstruct at least that part of the missing transcript containing the rationale for its decision to dismiss”); *Watson v. State*, 2001 WL 339637 (Del. Supr.) (“we remanded the case to the Family Court and instructed the trial court to reconstruct the record to the extent practicable.”); *Snowden v. State*, 672 A.2d 1017, 1026 (Del. 1996) (noting that the Superior Court had reconstructed the record of a preliminary hearing).

An evidentiary hearing will be held on Monday, September 27, 2010 at 9:00 a.m. for the same purposes identified in the remand of *Love v. State, supra*. At this hearing, Ms. Chapman, Mr. Veith, and/or Defendant may testify themselves or present other competent evidence. The Court declines to appoint counsel for Defendant.

IT IS SO ORDERED.

Richard R. Cooch, J.

oc: Prothonotary
cc: Investigative Services
Mr. John Donnolly, Chief Court Reporter

⁹ 76 C.J.S. *Records* § 41 (West 2010) (“Lost or destroyed public records may be restored or substituted by proper proceedings brought for that purpose . . .”).