

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable Diane S. Goodstein, Circuit Court Judge

AIKEEM K. LOTT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000179

JOHNSON PETITION FOR WRIT OF CERTIORARI

Wanda H. Carter
Deputy Chief Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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ISSUE PRESENTED

The PCR judge erred in summarily dismissing petitioner's PCR action due to his failure to appear at the PCR hearing because the Order of Dismissal was issued without a finding via evidentiary proof as to whether petitioner willfully failed to appear at the PCR hearing.

STATEMENT OF CASE

Petitioner Aikeem Lott pled guilty to voluntary manslaughter, attempted armed robbery, and possession of a firearm during the commission of a violent crime during the May 2016 term of the Orangeburg County General Sessions Court before Judge Maite Murphy. App. 1-16. Petitioner was sentenced at the June 2017 term of the Orangeburg County General Sessions Court by Judge Murphy to imprisonment for an aggregate twenty-five-year term. App. 19-35. Petitioner did not appeal his guilty pleas or sentences. Stanley Meyers and Doug Mellard represented petitioner at the guilty plea and sentencing proceeding, and Assistant Solicitor Sarah Ford appeared at both proceedings in the case.

Petitioner filed a PCR application on April 27, 2018, with the Orangeburg County Office of the Clerk of Court. App. 37-43. The respondent filed a Return dated July 7, 2018. App. 45-50. Petitioner's Amended PCR application was filed on May 24, 2019. App. 51-52.

On September 9, 2019, a PCR hearing was convened at the Orangeburg County Courthouse before Judge Diane S. Goodstein. Assistant Benjamin H. Limbaugh was present at the hearing, and PCR counsel Jonathan D. Walker was present at the hearing also. App. 53-58. However, petitioner was not present at the hearing due to SCDC transportation issues. Petitioner was not transported to the Orangeburg County Courthouse for the PCR hearing. The state moved to dismiss for failing to prosecute. App. 55, lines 16-25.

On February 3, 2022, Judge Goodstein issued an Order of Dismissal on the ground of failure to prosecute. App. 60-64. Petitioner appealed. This petition followed.

ARGUMENT

The PCR judge erred in summarily dismissing petitioner's PCR action due to his failure to appear at the PCR hearing because the Order of Dismissal was issued without a finding via evidentiary proof as to whether petitioner willfully failed to appear at the PCR hearing.

During the PCR hearing, the respondent moved to dismiss petitioner's PCR action because of his failure to appear at the PCR hearing that was convened on his behalf. The respondent surmised without proof that petitioner "refused transport" without "a valid reason," and also went on to speculate without proof that "he (petitioner) just didn't want to come." App. 55, line 16 – p, 56, l. 5. However, counsel for petitioner explained that there was prior confusion with respect to the issuance of subpoenas and an unavailable witness at petitioner's first PCR hearing, and that petitioner was present in court at that time. Counsel added that there was no indication to his knowledge from petitioner that he did not intend to go forward with his PCR case at this instant PCR hearing. App. 56, lines 10-20.

Note that post-conviction relief is a civil action generally subject to the rules of civil procedure. Sutton v. State, 361 SC 644, 606 S.E.2d 779 (2004). Under Rule 55(d), SCRCP, it is clearly stated that where a party against whom a judgement for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and the fact is made to appear by **affidavit** or otherwise, the clerk shall enter his default. Also, for good cause shown a court may set aside an entry of default based on Rule 60(b), SCRPC.

Apparently, no affidavits were submitted by petitioner or the respondent to the PCR court regarding the issue of the circumstances of petitioner's failure to be transported to court for the PCR hearing in question; and as a result, there was no finding that could have been reached upon evidentiary support as to whether petitioner's failure to appear was a willful act. We reach this

conclusion because the PCR judge did not refer to any affidavits received in the PCR Order of Dismissal handed down in the case.

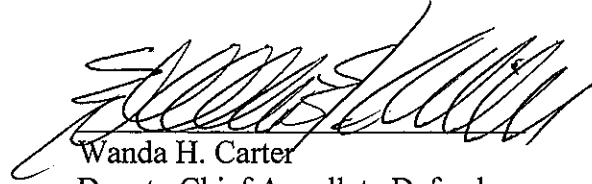
Additionally, at this PCR hearing, the PCR judge referred to the absence of affidavits in the matter, and left the record open to receive affidavits from all parties involved with respect to the question of why petitioner was not transported to court for the scheduled PCR hearing. Clearly, based on the wording of the Order of Dismissal, no affidavits ever materialized in the case. The PCR judge erred in ruling that petitioner refused to be transported to court and in summarily dismissing the case on that ground because there was no proof affirming the same without the required affidavits in support of or contrary to such a conclusion. Therefore, since there was no evidentiary basis for the PCR Court to have summarily dismissed the case on the ground that petitioner refused to appear for the PCR hearing, said Order of Dismissal was issued upon speculation and conjecture and without any sufficient evidentiary basis.

It is customary that the trial judges make a willful finding via evidentiary proof, usually in the form of affidavits, in reference to the circumstances regarding a litigant's failure to appear in a case. State v. Boatwright, 310 S.C. 281, 423 S.E.2d 139 (1992); State v. Adkison, 264 SC 180, 213 S.E.2d 591 (1975); Hodges v. Fanning, 266 SC 517, 224 S.E.2d 713 (1976). In McLeod v. Wilson, 279 SC 562, 310 S.E.2d 818 (1983), the Court held that the willful failure to appear for a deposition resulted in a default judgement as a sanction.

In the instant case, there were no affidavits submitted to the PCR court explaining or expounding on the subject of petitioner's failure to appear at the instant PCR hearing, and thus the PCR court made no finding regarding the topic of willfulness in the matter, and went on to summarily dismiss the case without a sufficient evidentiary basis on this issue. The PCR judge erred in dismissing petitioner's PCR action for failure to appear sans sufficient evidentiary proof via the required affidavits on the question of whether petitioner willfully failed to appear at his PCR hearing convened in the case.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that the Order of Dismissal filed in this case be vacated, and moves for the case to be remanded for the submission of affidavits on the subject of failure to appear, and the issuance of an amended order thereafter.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of July, 2022.

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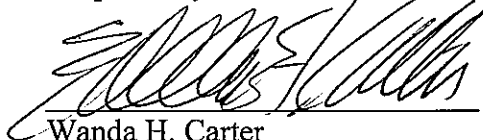
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Aikeem K. Lott states that:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Diane S. Goodstein, which was held on September 9, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Aikeem K. Lott.

Respectfully Submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of July, 2022.

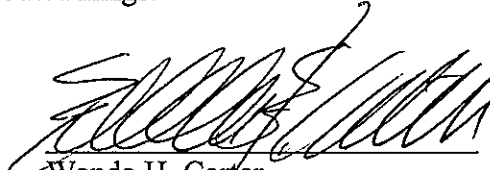
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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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This 11th day of July, 2022.