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Oct 17 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Lexington County
Honorable Walton J. McLeod, IV, Circuit Court Judge

WORTH EDWARD COOK III,

RESPONDENT,

V.

THE STATE

APPELLANT

APPELLATE CASE NO. 2021-001267

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

JESSICA M. SAXON
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INDEX

INDEX..... i

ARGUMENT IN REPLY

The proper standard of review is the standard already established for summary dismissal. The issue is preserved for this Court to review. Respondent misapprehends Petitioner’s argument on appeal. Petitioner agrees that a court may review an application for sufficiency of the assertions but submits that such a review must occur under the proper standard and framework.....1

CONCLUSION.....6

ARGUMENT IN REPLY

The proper standard of review is the standard already established for summary dismissal. The issue is preserved for this Court to review. Respondent misapprehends Petitioner's argument on appeal. Petitioner agrees that a court may review an application for sufficiency of the assertions but submits that such a review must occur under the proper standard and framework.

Standard of Review

Respondent suggests to this Court that the proper standard of review would be the standard applied to review of motions for a new trial under Rule 29, S.C.R.Crim.P., because the Act provides that “[a]ll rules and statutes applicable in criminal proceedings are available to the applicant and the solicitor or Attorney General.” S.C. Code Ann. § 17-28-90. Respectfully, Respondent takes that language out of context. Section 17-28-90 only applies after a hearing has been granted. At a *hearing*, the rules and statutes applicable in criminal proceedings would govern. However, there are no rules or statutes applicable in criminal proceedings that pertain to the summary dismissal of a matter because the concept does not exist in criminal law.

In providing for summary dismissal of an application for post-conviction DNA testing filed in the Court of General Sessions, the legislature intertwined the civil and criminal procedure of this state. As argued in the petition for writ of certiorari, the closest procedural corollary is summary dismissal of post-conviction relief matters. Further, because Petitioner's case presents a novel issue of law, “the appellate court is free to decide the question of law with no particular deference to the trial court.” Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000); l'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718 (2000). Petitioner respectfully requests this Court hold that when either a circuit

court or an appellate court is considering the propriety of a summary dismissal of a DNA Act application, that court “must assume facts present by an applicant are true and view those facts in the light most favorable to the applicant.” Wilson v. State, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002) (citing Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000)); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005).

Error Preservation

Respondent asserts that Petitioner’s argument is procedurally barred because it was not raised below. The thrust of Petitioner’s argument, that summary dismissal was not proper, is clearly preserved. Petitioner responded to the conditional order of dismissal arguing, to the best of his ability, that dismissal was improper, that a hearing should be held, and that the application for DNA testing should be granted. Admittedly, Petitioner did not argue that the court applied the wrong standard of review or that the court conflated the requirements of S.C. Code Ann. §§ 17-28-40 and 17-28-90. That does not, however, preclude this Court from addressing the matter.

Importantly, Petitioner filed the application and response to the conditional order of dismissal without the aid of counsel. There is no provision of the law for the appointment of counsel in post-conviction DNA testing cases *unless* a hearing is held on the application. See S.C. Code Ann. 17-28-60 (The court must appoint counsel for an indigent applicant after the court has determined that the application is sufficient to proceed to a hearing but prior to the actual hearing). Petitioner did not choose to proceed *pro se* after having been warned of the dangers and responsibility of self-representation pursuant to Faretta v. California, 422 U.S. 806 (1975). Instead, Petitioner was defaulted into *pro se* representation, as he was incarcerated and indigent, could not hire private counsel to file the application, and could not have counsel

appointed under the Act. To hold Petitioner to the rigid standards of error preservation in such a circumstance would be contrary to the interests of justice.

Our Supreme Court has stated that “there are situations where the interests of justice require ... courts to be flexible with procedural requirements *before* ... applicants suffer procedural default on substantial claims.” Mangal v. State, 421 S.C. 85, 99, 805 S.E.2d 568, 575 (2017) (emphasis in original). Even the United States Supreme Court acknowledge in Martinez v. Ryan, 566 U.S. 1, 12 (2012), that applicants “confined to prison” and “unlearned in the law” often have difficulty complying with procedural rules. The Martinez Court further wrote, “[a]llowing a federal habeas court to hear a claim ... when ... the absence of an attorney caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel ... may not have been sufficient to ensure that proper consideration was given to a substantial claim. *Id.* at 14. While our Supreme Court has found that Martinez only applies to federal habeas actions, the reasoning espoused by the United States Supreme Court is applicable to Petitioner’s case.

Petitioner’s main issue, that summary dismissal was improper, is preserved for this Court to review. Petitioner filed the application and responded as best he could to the lower court’s conditional order of dismissal to preserve the matter for review. The lower court committed an error of law in applying the wrong standard of review, the wrong factors of the act, and the wrong burden of proof. These extraordinary circumstances, when coupled with Petitioner’s default status as a *pro se* litigant, are such that any procedural default should be excused. See Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016); Mangal, *supra*.

Merits of Appeal

Respondent asserted that Petitioner's argument on appeal was that "once an application is submitted reflecting an explanation under the factors listed in S.C. Code § 17-27-40, the circuit court judge cannot evaluate the explanation for sufficiency of the assertions, but must hold a hearing." (Return to Cert. Pg. 14). Petitioner has never made such an argument. The DNA Act specifically allows a judge to determine the sufficiency of the assertions made in an application in determining whether to grant a hearing or to summarily deny the application. See S.C. Code Ann. 17-28-50(C). Petitioner has argued that summary dismissal of the application was not proper because the court applied the wrong standard to the wrong factors under the Act in deciding to summarily dismiss the case.

Respondent admits that the judge, in the final order, made the finding that Petitioner had failed to establish the factors by a preponderance of the evidence. Respondent characterizes this finding as "additional" and argues that the inclusion of the phrase does not invalidate the remainder of the order "particularly since the judge was adopting the conditional order that did not contain that phrase." (Return to Cert. 9). This is an incorrect factual assertion. In the conditional order of dismissal that was adopted, the lower court began its analysis by stating "In the light most favorable to Applicant, he has failed to meet all of the requirements by a *preponderance of the evidence*." App. 1068 (emphasis added). Both the conditional order of dismissal and the final order of dismissal found that Petitioner had failed to prove the factors enumerated by the Act by a preponderance of evidence. Petitioner was held to a higher burden of proof than the law required.

Petitioner further argued that while the court did state that it viewed the facts in the light most favorable to Petitioner, it did not assume the facts in the application to be true prior to

summarily dismissing the application. The standard for summary dismissal that has been repeated by the appellate courts of this state is that “a judge must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant.” Wilson v. State, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002) (citing Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000)). That standard was not properly applied in Petitioner’s case.

Respondent further argues that the language used by the court “appears to track” with S.C. Code Ann. § 17-28-40 (Return to cert. 10). The analysis by the court in the conditional order of dismissal discusses whether the requested testing and subsequent results would be *material* to the issue of Petitioner’s identity as the perpetrator of the crime. App. 1069; App. 1093. Nowhere in section 17-28-40 is materiality addressed. The only time an applicant is tasked with proving materiality is at a hearing. The language used in both the conditional order of dismissal and the final order of dismissal reflects that the court improperly analyzed the application under section 17-80-90.

The Act allows a judge to contemplate summary dismissal of an application for post-conviction DNA testing. However, those considerations must be made under the proper standard and within the proper framework. That did not occur in Petitioner’s case. The lower court used the wrong section of the Act, the wrong standard of review, and held Petitioner to a burden of proof that is not required at the summary dismissal stage. These were extraordinary errors of law that support overturning the summary dismissal of Petitioner’s application for post-conviction DNA testing.

CONCLUSION

Based on the arguments contained above, as well as those in the original Petition for Writ of Certiorari, Petitioner respectfully requests that this Court grant certiorari to allow for full briefing of the issues.


Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of October, 2022.

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WORTH EDWARD COOK III,

RESPONDENT,

V.

THE STATE

APPELLANT

APPELLATE CASE NO. 2021-001267

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Reply to Return to Petition for Writ of Certiorari in the above referenced case has been served upon Melody J. Brown, Esquire, at the primary email address listed within the Attorney Information System (AIS); and Worth Edward Cook, #293532, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 17th day of October, 2022.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

From: [Warren, Kaylynn](#)
To: [SC - BROWN MELODY](#)
Cc: [Saxon, Jessica](#); [Angela Brown](#)
Subject: 2021-001267 Worth Edward Cook III v. The State
Date: Monday, October 17, 2022 2:49:00 PM
Attachments: [2021-001267 Worth Edward Cook III v. The State Reply to Return to PWC and COS.pdf](#)

Good Afternoon,

Please find attached for service in the above-referenced case the Reply to Return to the Petition for Writ of Certiorari and accompanying Certificate of Service which will be filed today, October 17, 2022, with the Court of Appeals via OneDrive.

Respectfully,

Kaylynn

Kaylynn Warren

Administrative Assistant

South Carolina Commission on Indigent Defense

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