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Feb 21 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Beaufort County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2018-001204

CHARLES GREEN, JR.,

Petitioner,

vs.

THE STATE,

Respondent.

PETITION FOR REHEARING

On January 25, 2023, this Court issued an unpublished opinion in which it reversed the post-conviction relief judge's order denying relief to Green and remanded for a "new" evidentiary hearing. Green v. State, Op. No. 2023-UP-026 (S.C. Ct. App. filed Jan. 25, 2023). In reversing the post-conviction relief judge's order, this Court concluded: (1) the post-conviction relief judge improperly limited Green's ability to fully present his claims by "requir[ing] Green's counsel to evaluate and effectively discard Green's claims under the limitations of Rule 11 before effectively presenting them" to the court; and (2) the appropriate relief was the reversal of the post-conviction relief judge's order—which presumably included the portions of it addressing the claims Green was fully permitted to litigate—and a remand for an entirely new evidentiary hearing in which Green will be able to attempt to prove his claims anew. Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, the State respectfully petitions for rehearing because it believes this Court misapprehended and

overlooked several critical points when reversing and remanding for an entirely new evidentiary hearing in Green's case.

As this Court correctly recognized, Rule 11 of the South Carolina Rules of Civil Procedure has been determined by our Supreme Court to be inapplicable to post-conviction relief proceedings. See Hiott v. State, 381 S.C. 622, 629, 674 S.E.2d 491, 494-495 (2009) ("[W]e hold that Rule 11 of the South Carolina Rules of Civil Procedure does not apply in PCR proceedings."). Thus, to the extent the post-conviction relief judge relied upon Rule 11 in Green's case, his decision to do so was—just as this Court concluded—incorrect. Id.; but see S.C. Code Ann. § 56-36-10 (authorizing both counsel and pro se litigants to be sanctioned for—amongst other things—"making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts" and including no exception indicating a lack of applicability to post-conviction relief actions).

Nevertheless, the post-conviction relief judge in Green's case did *not* rely solely on Rule 11 in his attempt to determine with clarity and specificity what claims were actually being pursued by Green. Instead, in directing Green's counsel to identify the allegations to be addressed during the evidentiary hearing with specificity, the post-conviction relief judge indicated he was doing so based on "other grounds" as well. Significantly, those other grounds are what really matters in Green's case. And, pursuant to those other grounds, the post-conviction relief judge was not—as this Court's functionally determined—powerless to require specificity as to the claims being raised or to place limitations on what could be presented during the evidentiary hearing. To the contrary, the post-conviction could properly do what he did in Green's case by requiring Green's counsel to identify with specificity any viable, non-frivolous

claims Green wished to pursue before proceeding forward with the evidentiary hearing, and his decision to do so under the circumstances involved was reasonable and proper.

As to those "other grounds" permitting exactly what occurred in Green's case, the post-conviction relief judge could first properly rely on the Uniform Post-Conviction Procedure Act itself. More specifically, Section 17-27-50 of that Act requires all the grounds for relief being pursued to be "specifically set forth," which was all the post-conviction relief judge was seeking. Likewise, Section 17-27-70 allows a post-conviction relief judge at any time prior to the issuance of a final judgment to *order* amendment to a post-conviction relief application or any pleading. Through those mechanisms, the post-conviction relief judge was authorized by our legislature to demand clarity and specificity in regard to the allegations being pursued before expending valuable—and limited—court time and resources conducting an evidentiary hearing. Cf. Hiott, 381 S.C. at 629-630, 674 S.E.2d at 494-495 (recognizing other systems exist aside from Rule 11 to prevent the "potential abuse of PCR proceedings" and expressing concern about how allowing Rule 11 sanctions would "create an additional burden on the resources of the court").

Next, the post-conviction relief judge's actions in Green's case were proper in light of several provisions of the South Carolina Rules of Civil Procedure. Specifically, Rule 71.1—in conjunction with Section 17-27-60—affords petitioners like Green a right to the assistance of counsel in post-conviction relief proceedings. See Rule 71.1, SCRCP ("If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent."). Importantly though, South Carolina does *not* permit hybrid representation in legal proceedings. See Miller v. State, 388 S.C. 347, 347, 697 S.E.2d 527, 527 (2010) (explaining hybrid representation that is partially pro se and partially by counsel is not permitted in South Carolina). Thus, once counsel

has been provided in a post-conviction relief case, that counsel—and not the individual petitioner—is tasked with controlling and presenting the case on the petitioner's behalf, and, as part of counsel's responsibilities in doing so, counsel is required to review the case to determine the *available* grounds and amend the application when needed, which necessarily involves clarifying the claims that need to be clarified and winnowing out weak or meritless ones that cannot be established. See Rule 71.1, SCRCP ("Counsel shall be given a reasonable time to confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and *shall* amend the application if necessary." (emphasis added)). In addition to that, Rule 12 permits a post-conviction relief judge to require a more definite statement when the claims raised are too vague or ambiguous to be reasonably understood or addressed. See Rule 12(e), SCRCP ("If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the Court is not obeyed within 15 days after notice of the order or within such other time as the Court may fix, the Court may strike the pleading to which the motion was directed or make such order as it deems just."). In light of those provisions, it was not improper for the post-conviction relief judge to require Green's counsel to carry out his role in the process and identify with specificity all the viable, non-frivolous claims Green wished to pursue before the evidentiary hearing moved forward.

Furthermore, the South Carolina Rules of Evidence provide some support for the post-conviction relief judge's actions in Green's case. In particular, Rule 401 and Rule 402 together ensure only relevant evidence is and will be admitted during the proceedings. See Rule 401,

SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."); see also State v. Douglas, 369 S.C. 424, 430, 632 S.E.2d 845, 848 (2006) (explaining only relevant evidence should be admitted). In light of those rules, the post-conviction relief judge had the ability to restrict the testimony and evidence presented during the evidentiary hearing in Green's case to only matter that was relevant to the case.

Finally, the South Carolina Rules of Professional Conduct also provide justification for the limitations imposed by the post-conviction relief judge in Green's case. Specifically, Rule 3.1—which must be viewed in conjunction with the assistance of counsel provided in post-conviction relief cases through Rule 71.1 and Section 17-27-60—precludes lawyers from asserting or controverting issues unless a non-frivolous basis in law and fact exists. See Rule 3.1, RPC, Rule 407, SCACR ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established."). Based on that provision, Green's counsel, who had been appointed to provide Green with the assistance and "professional judgment" necessary to seek post-conviction relief in a legally-sound manner, could not properly

advance claims unless he had first determined there was a basis in law and fact for doing so. Id. And, relatedly, he could not be forced to surrender his ethical obligations and pursue frivolous claims without notifying the post-conviction relief judge even if Green had wished him to do so. See Jones v. Barnes, 463 U.S. 745, 751 (1983) (explaining no authority suggests an "indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points"); see also Anders v. California, 386 U.S. 738, 744 (1967) ("Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, *he should so advise the court and request permission to withdraw*." (emphasis added)); cf. Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (confirming the Anders process, which requires counsel to brief "arguable issues" while *also* submitting a request to be relieved as counsel, remains applicable to appeals in post-conviction relief cases).

Based on all those different provisions of South Carolina law, the limitations placed by the post-conviction relief judge on the testimony presented and questioning conducted during the evidentiary hearing in Green's case were entirely proper and prudent. For those reasons coupled with the reasons articulated in the State's brief and during oral argument before this Court, the post-conviction relief judge's ruling—contrary to the conclusion reached by this Court—should not have been reversed based purely on his incorrect reliance upon Rule 11 *at the same time* he correctly relied upon "other grounds" to impose the sensible limitations imposed. See Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943) ("[W]e do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a

decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." (citations and internal quotations omitted)). Accordingly, the State respectfully requests this Court reconsider this matter pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, vacate its prior opinion, and issue a new opinion affirming the post-conviction relief judge's order denying relief.[1]

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

By:_____
Mark R. Farthing
S.C. Bar Number 76901

February 21, 2023

[1] Alternatively, in light of the nature of the issue this Court found existed in regard to the limitations imposed by the post-conviction relief judge, the State asks the Court to reconsider its decision to reverse the post-conviction relief judge's order in total and remand for an entirely new evidentiary hearing. Supporting the propriety of such an alternative request, Green was *not*—despite the limitations imposed by the post-conviction relief judge—prevented from presenting all the testimony and evidence he wished to present in support of his claims regarding trial counsel's failure to object to hearsay testimony, trial counsel's failure to present the testimony of a particular witness, and appellate counsel's failure to raise a speedy trial issue on appeal, and all those claims have already been ruled upon by the post-conviction relief judge in a manner entirely unimpacted by the limitations he placed at the outset of the evidentiary hearing. (App'x pp. 317-331). Since those specific claims have already been fully litigated and ruled upon, Green has already received his "one bite at the apple" concerning those claims and is not entitled to—and should not receive—the windfall of a second opportunity to prove those claims after his first full opportunity proved to be unsuccessful for him. See Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) ("Under the PCR rules, an applicant is entitled to a fully adjudication on the merits of the original petition, or 'one bite at the apple.' "). Accordingly, at a minimum, this Court should reconsider the relief granted and tailor that relief to ensure it fairly addresses the error found while not simultaneously causing unnecessary litigation of issues that have already been fully and fairly litigated. See id. at 261, 523 S.E.2d at 755 (requesting successive post-conviction relief applications are permitted in rare circumstances and can allow for grounds not addressed in an earlier hearing to be addressed).

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PROOF OF SERVICE

I, Leigh Ann Stone, certify I have served the within Petition for Rehearing on Petitioner by sending an electronic copy via email to the address listed in AIS for the following individual:

Taylor D. Gilliam, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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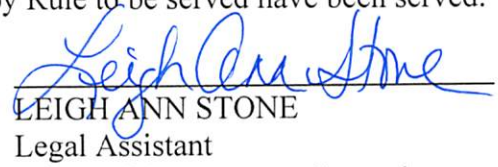
I further certify all parties required by Rule to be served have been served.
This 21st day of February, 2023.



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From: Leigh Ann Stone
Sent: Tuesday, February 21, 2023 4:56 PM
To: Gilliam, Taylor
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Subject: Charles Green, Jr. v. State (2018-001204)
Attachments: Green.Pet for Rehearing (03225687xD2C78).PDF

Good Afternoon Mr. Gilliam,

Attached please find a copy of the Petition for Rehearing in Charles Green, Jr. v. State (2018-001204). This petition will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

Thank you,

LEIGH ANN STONE, Legal Assistant
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