

THE STATE OF SOUTH CAROLINA
COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Shirley C. Robinson, Administrative Law Judge
Docket No.: 11-ALJ-15-0035-AP
Appellate Case No.: 2012-213320

Dallas Ferrell #239855,

Appellant,

vs.

South Carolina Department of Probation,
Parole and Pardon Services,

Respondent.

FINAL BRIEF OF APPELLANT

RECEIVED
MAY 17 2013
SC COURT OF APPEALS

TOMMY A. THOMAS
P.O. Box 88
Irmo, SC 29063
(803) 732-5507
ATTORNEY FOR APPELLANT

THE STATE OF SOUTH CAROLINA
COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Shirley C. Robinson, Administrative Law Judge
Docket No.: 11-ALJ-15-0035-AP
Appellate Case No.: 2012-213320

Dallas Ferrell #239855,

Appellant,

vs.

South Carolina Department of Probation,
Parole and Pardon Services,

Respondent.

FINAL BRIEF OF APPELLANT

TOMMY A. THOMAS
P.O. Box 88
Irmo, SC 29063
(803) 732-5507
ATTORNEY FOR APPELLANT

TABLE OF AUTHORITIES

Reed v. Ozmidt, 374 S.C. 19, 647 S.E. 2d 209 (2007) 4

Singleton v. State, 313 SC 75, 437 S.E.2d 53 (1993) 4

Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008) 5

State v. Downs 369 S.C.55, 631 S.E.2d 79 (2006) 4

STATEMENT OF THE ISSUE ON APPEAL

1. Whether the Lower Court erred in finding the Appellant is not entitled to the statutory right to seek parole consideration as said agreement is a valid waiver of his right to seek parole.

STATEMENT OF THE CASE

The Appellant was tried by Jury in Florence County. He was found guilty of Murder, Conspiracy, four counts of Criminal Sexual Conduct, House Breaking and Arson. On April 2, 1983, following the guilty phase of the trial, the Jury recommended and the Court imposed the sentence of death.(ROA p. 103-104, 107)

The Appellant filed a Direct Appeal. The South Carolina Supreme Court remanded the case to the Circuit Court for the purpose of conducting another sentencing hearing. Said hearing was to determine the punishment to be imposed for the Murder conviction.

Prior to the convening of a second sentencing hearing, the Appellant negotiated a sentence of life rather than risk the return of another death sentence. As a result of these negotiations the appellant entered into a “contractual agreement waiving all right to parole”. On May 20, 1997, (ROA p. 96-101) the Appellant signed a document captioned “irrevocable waiver of parole”. (ROA p. 95) The “Contractual agreement waiving all rights to parole” was signed by Dallas Ferrell, the Appellant, Dudley Saleeby, Jr., Solicitor, Carl N. Lundberg, Counsel for Probation, Parole and Pardon Services, Richard W. Strobel and Darryl J. Corbin, Attorney’s for Mr. Ferrell. Both of these documents were filed with the Court on May 20, 1997.

Pursuant to the Contractual Agreement, the Appellant acknowledged that he would be eligible for parole in twenty (20) years from the date of his initial imprisonment on the Murder charge. But because of his agreement, he would be denied parole after he becomes eligible for the rest of his life.

The agreement additionally states that the Appellant would never apply for, nor accept a Pardon for the offense of Murder and that the Appellant waives any claim of double jeopardy regarding the sentencing proceeding being re-imposed should he breach the contractual agreement. (ROA p. 98-101)

On June 30, 1998, an Application for Post-Conviction Relief was filed alleging ineffective assistance of counsel, involuntary guilty plea and double jeopardy violation. (ROA p. 65-73) The issues were not heard on the merits. The case was dismissed on the State's Motion as being outside of the Statute of limitations, by order of the Court on July 11, 2000, The Honorable James E. Brogdon, Jr., presiding. (ROA p. 83-86)

On May 5, 2010, through his attorney Tommy Thomas, an inquiry was made with the South Carolina Department of Probation, Parole and Pardon Services requesting that he be considered for parole.

By letter dated May 16, 2011, the South Carolina Department of Probation, Parole and Pardon Services indicated that in the opinion of the Department, the Appellant "was not and should not be considered for parole." (ROA p. 93-94)

A timely Notice of Appeal was filed. The Appeal follows:

ARGUMENT

a) Whether the Lower Court erred in finding the Appellant is not entitled to the statutory right to seek parole consideration as said agreement is a valid waiver of his right to seek parole.

In this matter, the Appellant is seeking to be considered for Parole. The Appellant has never been considered and is not appealing a denial of the Board after a full hearing.

The legal research in this case indicates that there are no direct cases that consider an inmate's waiver of parole eligibility. However, there are a number of cases that do address the issues of waiver of the right to appeal as well as waiver of the right to seek Post Conviction Relief. There appears to be two categories of case law discussing the validity of an individual's waiver of certain rights. One is the Defendant's waiver of Appellate and PCR rights in Capital cases and second the waiver of Post-Conviction Relief in a non-capital case.

The Appellant's case is significant in the fact that Mr. Ferrell was initially sentenced to death and the sentence was later over turned by the South Carolina Supreme Court. This case was remanded back for a second hearing regarding the penalty phase.

The Court has addressed in *State v. Downs* 369 S.C.55, 631 S.E.2d 79 (2006), the issue of waiver of Appellate rights in death penalty cases and has reached the conclusion that a waiver is valid as long as it meets two prongs. The Court found that the standard for determining whether an appellant or PCR applicant is competent to waive the right to a direct appeal or PCR includes a cognitive prong and an assistance prong under *Singleton v. State*, 313 SC 75, 437 S.E.2d 53 (1993). Failure of either prong is sufficient to find that the waiver was not freely, voluntarily, knowingly and intelligently given, *Downs Supra*.

The Court in *Reed v. Ozmidt*, 374 S.C. 19, 647 S.E. 2d 209 (2007), addresses the issue of the waiver of an appeal of a Post-Conviction Relief decision in a capital case. The Court, in reference to Singleton, sets forth the following standard to determine competency to waive the right to a direct appeal or Post-Conviction Relief. The first prong is the cognitive prong which can be defined as: whether a convicted defendant can understand the nature of the proceedings, what he was tried for, the reason for the punishment, or the nature of the punishment. The

second prong is the assistance prong which can be defined as: whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel.

The Court has considered waiver of a Defendant's Post Conviction Relief rights in a non-death penalty case, in the case of Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008). The Court concluded that a waiver given in conjunction with a plea must be knowingly, voluntarily, intelligently and freely given. The court in making its determination that the Petitioner made his waiver knowingly, voluntarily and intelligently looked beyond the plea colloquy. The Court additionally looked at the particular facts and circumstances of the case, including: 1) The background, experience and conduct of the accused, 2) the text of the plea agreement, and 3) the transcript of the plea hearing. The Court has in capital cases noted that although they recognized that the Circuit court Judge who saw and heard the witness is in a better position to evaluate their credibility they are not bound by the Circuit Courts findings or rulings. Reed (Supra).

In the Contractual Agreement at hand, the document states that Dallas Ferrell signed the Contractual Agreement acknowledges and attests to the following:

- a. That he is mentally and legally competent.
- b. He has full understanding of the terms and provisions of the Contractual Agreement.
- c. He has read the Contractual Agreement in detail.
- d. He has had ample opportunity to discuss and has discussed at length the terms and provisions of this agreement with his attorneys.
- e. That he understands that the provisions of the contractual agreement are permanent and irrevocable, such that he should never be entitled to apply for parole, be given the consideration for parole or be granted parole.

- f. That he understands that the provisions of the contractual agreement are permanent and irrevocable, such that he shall never apply for a pardon or accept a pardon.
- g. That it is the purpose and intent of this contractual agreement that Dallas Ferrell live the remainder of his natural life in a correctional facility in a secure confinement. (ROA p. 100-101)

While the Appellant acknowledges that the agreement appears to be all encompassing, there also appears to be evidence that the Appellant's waiver of parole was not freely and voluntarily given. In the Plea transcript before the Honorable Paul M. Burch on May 20, 1997, reference is made to the Appellant's diagnosis and treatment for a mental illness.

“THE COURT: Have you ever been institutionalized for any mental problem?

MR. FERRELL: Yes, sir.

THE COURT: Tell me about it.

MR. FERRELL: I was in the Medical University Hospital in Charleston for six months. They said I was schizophrenic.

THE COURT: All right, and when was that?

MR. FERRELL: It's been so long ago, I don't even remember.

THE COURT: All right. Since you have been incarcerated, have you had any treatment for any mental condition?

MR. FERRELL: No, sir.” (ROA p. 40)

In addition, the Appellant in his Post-Conviction Relief Application attached a statement to question #10. The Appellant states:

“During my second sentencing I was many times threatened by the solicitor of Florence, SC. I was told in the presence of my Attorney’s (Richard W. Strobel and Darryl Corbin) that if I did not sign this contractual agreement, I would be placed back on death row. I had already spent (11) years of my life on death row, constantly in fear of my life. I did not want to go back. There were discrepancies in my first sentencing in which my rights was infringed. It was Court Ordered that I be resentenced. Due to the Double Jeopardy laws, the solicitor’s office could not re-seek the death sentence. At the time I entered into this ... said agreement, I was unaware of these laws. My lawyers were present but did not make me aware of the Double Jeopardy Laws of the United States. They did just the opposite. They advised me to sign the Agreement. I was scared and coerced into this agreement. I will go further to say I feel there was a conspiracy set forth against me between the Public Defender’s Office and the Solicitor’s Office of Florence County, SC. There is no denying insufficient council on the part of the Public Defender’s Office. I am attaching the Aforesaid contractual agreement hereto as proof of my allegations set forth in this statement.” (ROA p. 69)

For the foregoing reasons and based upon the record:

The Appellant would submit that the Lower Court erred in finding:

- 1) That there exists evidence that the appellant was competent to enter into the contractual agreement waiving all right to parole and irrevocable waiver of parole.
- 2) That the contract and waiver were entered into voluntarily, knowingly, intelligently and freely.

That evidence exists:

- 1) That the issue of competency was not resolved by the Lower Court.

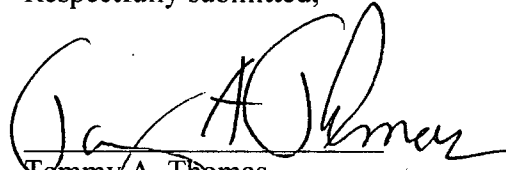
2) That the two prongs of cognitive and assistance fail and that the failure of one or both prong would require a finding that the waiver and contract were not freely, voluntarily, knowingly and intelligently given.

That the Court must look beyond just the Plea transcript and signed documents. The Court must look at the particular facts and circumstances of the case including 1) The background, experience and conduct of the accused, 2) the text of the plea agreement, and 3) the transcript of the plea hearing. In doing so, the Court should conclude that the Appellant's contract and waiver were not freely, voluntarily, knowingly or intelligently entered into.

CONCLUSION

That the Appellant is entitled to an Order of the Court directing that the South Carolina Department of Probation, Parole and Pardon Services schedule the Appellant for a parole hearing.

Respectfully submitted,


Tommy A. Thomas
Attorney for the Appellant

May 14 2013

THE STATE OF SOUTH CAROLINA
COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Shirley C. Robinson, Administrative Law Judge
Docket No.: 11-ALJ-15-0035-AP
Appellate Case No.: 2012-213320

Dallas Ferrell #239855,

Appellant,

vs.

South Carolina Department of Probation,
Parole and Pardon Services,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211 (b) of the South Carolina Appeals Court Rule.



TOMMY A. THOMAS

P.O. Box 88

Irmo, SC 29063

(803) 732-5507

ATTORNEY FOR APPELLANT

May 14, 2013

THE STATE OF SOUTH CAROLINA
COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Shirley C. Robinson, Administrative Law Judge
Docket No.: 11-ALJ-15-0035-AP
Appellate Case No.: 2012-213320

Dallas Ferrell #239855,

Appellant,

vs.

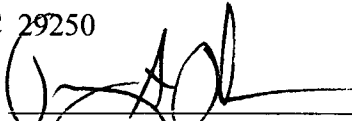
South Carolina Department of Probation,
Parole and Pardon Services,

Respondent.

CERTIFICATE OF SERVICE

I, Tommy A. Thomas, Attorney for the Appellant, hereby certify that I have served the Final Brief of Appellant and Record on Appeal on Tommy Evans by hand deliver said documents to:

Tommy Evans, Esq.
SC Department of Probation
Parole and Pardon Services
2221 Devine Street
Columbia, SC 29250



TOMMY A. THOMAS
P.O. Box 88
Irmo, SC 29063
(803) 732-5507
ATTORNEY FOR APPELLANT

May 17, 2013

RECEIVED

MAY 24 2013

SC Court of Appeals