

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable Grace Gilchrist Knie, Circuit Court Judge

JAY WALTER TATE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001358

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court err in summarily dismissing Petitioner's PCR application alleging newly discovered evidence, where Petitioner's application and responses created a genuine issue of material fact as to the existence of a search warrant in Petitioner's case?

STATEMENT OF THE CASE

On June 4, 1994, Jay Tate (Petitioner) was arrested for the stabbing death of his wife, Brenda Tate (Tate), and for the assault of his stepson, Joe Murray (Murray). App. 312; App. 317. He was ultimately indicted for one count of murder and one count of assault and battery with intent to kill. App. 314-315; App. 319-320. On January 17-18, 1995, the State represented by Holman Gossett and Trent Pruett called Petitioner's case to trial before the Honorable Sidney T. Floyd and a jury. Petitioner was represented by Richard Warder. App. 1.

At trial, the State alleged that Petitioner committed the stabbings because his marriage to Tate had deteriorated to the point where she had begun the process of filing for legal separation. App. 56, ll. 20-25. The State's witnesses testified that Petitioner stabbed Murray four times without provocation, and that he stabbed Tate without provocation once through the heart which resulted in her death. App. 69, l. 5-App. 73, l. 22; App. 124, l. 15-App. 125, l. 23; App. 147, l. 19-App. 148, l. 15. The State also presented testimony that in the day or two prior to the stabbings Petitioner, after having a dispute with Tate that resulted in police being called, had calmly stated he would kill Tate, Murray, Tate's daughter. App. 1661, ll. 4-24; App. 163, ll. 2-15; App. 168, ll. 4-14; App. 171, l. 11-App. 172, l. 4.

Petitioner's version of the events on June 1, 1994, varied substantially from the State's version. Petitioner maintained that a fight started after Murray physically and verbally assaulted him. Murray then went for a knife that was on the ground in front of the mobile home. Petitioner alleged that the pair fought over the knife, and he did not know how Murray was stabbed because they were wrestling around. Petitioner was able to get the knife away from Murray and was holding it in his hand when Tate ran into him, accidentally impaling herself

through the heart on the knife. Petitioner maintained that he did not murder Tate or intentionally injure Murray. App. 221, l. 7-App. 224, l. 2.

Petitioner was found guilty of the murder of Tate, and guilty of the lesser included offense of assault and battery of a high and aggravated nature as to Murray. App. 301, l. 20-App. 302, l. 5. Judge Floyd sentenced Petitioner to nine years imprisonment on the assault charge, and to life imprisonment on the murder charge. App. 308, ll. 4-12. Petitioner appealed his convictions and sentences. Counsel Warder filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). However, the appeal was ultimately dismissed for failure to timely serve the record on appeal. App. 322. The remittitur was issued on November 20, 1995. App. 323.

Prior to filing the instant PCR application, Petitioner filed two previous PCR applications. Petitioner filed his first PCR action on December 4, 1995, alleging ineffective assistance of counsel because 1) counsel did not challenge the validity of the indictment which did not include the date that the grand jury convened on, 2) counsel allowed lesser-included offenses be charged to the jury, 3) the weapon used in the incident was not shown to the jury, 4) the lesser-included offenses constituted double jeopardy because they were not indicted charges, 5) counsel did not challenge the sufficiency of the evidence, and 6) counsel did not perfect a direct appeal. App. 324-331. The State filed a Return dated March 5, 1996. App. 332-336. Petitioner, through PCR Counsel Thomas Shealy, filed an amended PCR application on December 5, 1996. App. 337-339.

An evidentiary hearing was convened before the Honorable J. Derham Cole on November 13, 1997. The State was represented by Chris Samellas. Petitioner was represented by Keith R. Kelly. App. 340. Petitioner and trial counsel Warder testified at the hearing. App. 341. At the hearing, the State conceded Petitioner was entitled to re-file the Anders brief

originally submitted by Counsel Warder along with the record on appeal. App. 343, l. 2-App. 344, l. 16. Judge Cole filed an order of dismissal of Petitioner's application but granted him leave to refile the Anders brief. App. 367-372.

Petitioner appealed the dismissal of his PCR application. Counsel for Petitioner filed a petition for writ of certiorari, arguing that Counsel Warder was ineffective for failing to challenge the validity of the indictments. Our Supreme Court granted certiorari and heard arguments on the issue on May 22, 2001. The Court, in a published opinion, ultimately held that although Counsel Warder was deficient in failing to challenge the indictments, Petitioner was not prejudiced because the defect in the caption did not invalidate the indictments or impact the trial court's subject matter jurisdiction over the case. App. 373-378. See Tate v. State, 345 S.C. 577, 549 S.E.2d 601 (2001).

Petitioner filed his second PCR¹ action on August 8, 2008, alleging newly discovered evidence regarding the date of his indictment and a constitutional violation. App. 380-390. The State filed a Return and Motion to Dismiss for being successive and untimely, and for failing to establish a *prima facie* case of newly discovered evidence. App. 391-398. A conditional order of dismissal was filed on May 16, 2009. App. 400-405. Petitioner filed *pro se* objections to the conditional order of dismissal. App. 406-425. The final order of dismissal was signed by the Honorable J. Mark Hayes, II, on November 20, 2009. App. 426-428.

¹ Petitioner has filed various other state and federal actions associated with his case. Prior to filing his second PCR action Petitioner filed a "Petitioner for Writ of Habeas Corpus" on November 2, 2001, (Case Number 2001-CP-11-604), which was summarily dismissed on October 13, 2003. Petitioner then filed a Writ of Mandamus on November 14, 2005, (Case Number 2005-CP-11-392) which was dismissed following a hearing on the State's motion to dismiss. Petitioner filed his first federal habeas action on August 15, 2005, (Case Number 9:05-cv-02269-GRA-GCK) but ultimately moved to dismiss the filing without prejudice. The motion to dismiss without prejudice was issued on May 15, 2006. Petitioner filed his second federal habeas corpus action on April 4, 2011, (Case Number 0:11-cv-00332-TMC) which was summarily dismissed on August 1, 2012.

Petitioner filed the current PCR application on July 15, 2020, raising a claim of newly discovered evidence. App. 432-443. Petitioner alleged he had discovered that law enforcement did not have a search warrant when they entered his home with keys the officers had found on the scene following the incident. In support of his application, Petitioner included a letter from the Cherokee County Sheriff which stated that a search warrant was not located in his case file. The letter also informed Petitioner to contact the Cherokee Magistrate's Office as search warrants originated from that court. App. 440. Petitioner also filed a *pro se* memorandum in support of his PCR application and a *pro se* motion requesting various documents from the grand jury proceedings in his case. App. 443-452.

The State filed a return and motion to dismiss on May 31, 2022, arguing the application should be dismissed for failing to establish a *prima facie* case of newly discovered evidence. The State argued that the letter provided by Petitioner, from the Cherokee County Sheriff, did not prove that a search warrant did not exist in his case because search warrants originated in the Magistrate's Office. Further, the State argued that the evidence regarding a search warrant could have been found through the exercise of due diligence before trial. Lastly, the State argued that the existence of a search warrant in Petitioner's case was immaterial and would not change the outcome of the proceedings because the officers entered the mobile home under the "hot pursuit" exception to the warrant requirement. App.453-463.

The Honorable Grace Gilchrist Knie filed a conditional order of dismissal on June 6, 2022, adopting the reasoning from the State's motion to dismiss. App. 466-474. Petitioner filed *pro se* objections to the conditional order of dismissal arguing that the doctrine of "hot pursuit" did not apply in his case. He then addressed the five factors of newly discovered evidence arguing "1) the search was an integral part of the case; thus, its suppression nullifies trial; 2) [the

evidence] was discovered post-trial/peril; 3) was told by counsel they had a search warrant and it was in proper form; 4) [the evidence] is relevant to this verdict; 5) [the evidence] is not merely cumulative or impeaching.” App. 476. Petitioner also filed a motion requesting a hearing on his 1995 PCR application. App. 478-479. Judge Knie issued the final order of dismissal on August 19, 2022, wherein the court adopted the conditional order of dismissal, and found that Petitioner’s responses to the conditional order of dismissal had not changed the court’s analysis that he failed to establish a *prima facie* case of newly discovered evidence. App. 487-489.

ARGUMENT

The PCR court erred in summarily dismissing Petitioner's PCR application alleging newly discovered evidence, where Petitioner's application and responses created a genuine issue of material fact as to the existence of a search warrant in Petitioner's case.

When considering the propriety of summary dismissal of a PCR application without a hearing, "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)). Further, the court may only summarily dismiss a PCR application when, "(1) it is apparent on the face of the application that there is no need for a hearing to develop any facts, and (2) the applicant is not entitled to relief." Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005). Stated differently, the court may grant a motion for summary judgment only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. McCoy v. State, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013); see also Kagan v. Simchon, 429 S.C. 516, 523, 839 S.E.2d 106, 109 (Ct. App. 2020). The appellate courts must view the facts in the same fashion when reviewing the appropriateness of a dismissal. Leamon, at 434, 611 S.E.2d at 494.

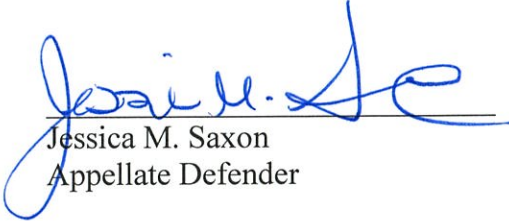
The summary dismissal of Petitioner's application without a hearing on the matter was improper. The question that the PCR court was required to answer was whether Petitioner's application and other filings created a genuine issue of material fact that required a hearing, not whether Petitioner had established a *prima facie* case of newly discovered evidence. The record establishes that Petitioner discovered that the Cherokee County Sheriff did not have a search warrant in his case file, but that Counsel Warder had advised Petitioner during trial that a search warrant had existed. Those contradictory facts, when taken as true and in the light most

favorable to Petitioner, create a genuine issue about a material fact of the case that cannot be resolved on the face of the application and filings alone.

Admittedly, Petitioner would ultimately have to establish a *prima facie* case for newly discovered evidence in order to prevail on his application. However, he should not have been denied the opportunity to make that showing at a hearing on his application where the filings created a genuine issue of material fact. The PCR court should have held a hearing on the issue of newly discovered evidence to determine whether Petitioner could in fact establish his *prima facie* case. Petitioner was wrongly denied the opportunity to fully litigate this issue with the assistance of counsel. This matter should be remanded back to the PCR court for a full evidentiary hearing on this claim.

CONCLUSION

Based on the forgoing argument, Petitioner respectfully requests this Court grant Petitioner's petition for writ of certiorari to allow full briefing of this issue.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of March, 2023.

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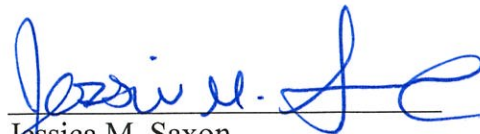
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jay Walter Tate states:

1. She is 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 pleadings before Judge Grace Gilchrist Knie, which were summarily dismissed without a hearing, 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 Jay Walter Tate.

Respectfully Submitted,



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of March, 2023.

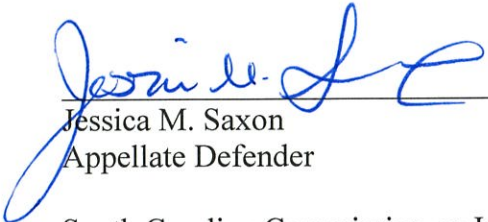
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CERTIFICATE OF COUNSEL

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 29th day of March, 2023.