

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Apr 13 2023

S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable G.D. Morgan, Jr., Circuit Court Judge

JOHNNY RAY WILKINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001231

JOHNSON PETITION FOR WRIT OF CERTIORARI

Sarah E. Shipe
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred denying relief where petitioner testified, he was not properly served with notice the state intended to seek life without the possibility of parole?

STATEMENT

On February 22, 2008, a Spartanburg County grand jury indicted petitioner for armed robbery. App. 191-92. Petitioner's case was called to trial before the Honorable J. Derham Cole and a jury on March 9, 2009.¹ App. 1. Timothy Ray represented petitioner and Barry Barnette, solicitor, represented the state. App. 1. The jury found petitioner guilty as indicted. App. 117. Judge Cole sentenced petitioner to a term of life without the possibility of parole (LWOP). App. 122, ll. 14-22.

Appellate counsel, Katherine Hudgins, filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) and a motion to be relieved as counsel. The Court of Appeals dismissed the appeal and granted appellate counsel's motion to be relieved. *State v. Wilkins*, 2011-UP-482 (S.C. Ct. App. Oct. 28, 2011). Petitioner has filed three previous applications for PCR.

Thereafter, petitioner filed a fourth application for PCR. App. 125-31. On April 20, 2022, an evidentiary hearing was held before the Honorable G.D. Morgan Jr. App. 160-61. Susannah Ross represented petitioner and Chelsey Marto represented the state. App. 161.

On August 1, 2022, Judge Morgan signed an order denying PCR. App. 184-90. The court found petitioner's claim of newly discovered evidence "must be dismissed as without merit." App. 188. The court found petitioner's allegation that he was not properly served with the state's notice seeking LWOP was refuted by the trial transcript, defense counsel's credible testimony and the solicitor's credible testimony. App. 189.

This petition follows.

¹ The transcript reflects that the trial was held in the year 2008. App. 1. However, the sentencing sheet and discussion of PCR counsel at petitioner's evidentiary hearing reflect that the date on the transcript is incorrect and the trial was held in 2009. App. 165, ll. 20-23; 193

ARGUMENT

The PCR court erred denying relief where petitioner testified, he was not properly served with notice the state intended to seek life without the possibility of parole.

Relevant facts

At trial, the solicitor mentioned their intention to seek LWOP for the first-time during sentencing. The solicitor stated that their investigator, Rick Gregory, served petitioner and defense counsel and that there were affidavits supporting the service of the state's notice of intention to seek LWOP. App. 119, ll. 20-24. The trial court noted that the first affidavit, "[was] not sworn to" and asked the solicitor whether it should have been notarized. App. 120, ll. 15-16. The solicitor offered both the testimony of the state's investigator, Mr. Gregory, and to have the affidavit notarized at that time and the court agreed. App. 120, ll. 17-22.

The solicitor questioned Mr. Gregory regarding whether he served petitioner and defense counsel with the state's notice of LWOP. App. 121, ll. 4-18. Mr. Gregory claimed he served both petitioner and defense counsel on February 25, 2009. App. 121, ll. 4-9. The solicitor admitted court's exhibit one, affidavit of service and notice, in support of their claim. App. 121, ll. 12-18; 194-200. The court asked defense counsel if they "[took] exception" to the state's exhibits. Defense counsel responded they did not. App. 122, ll. 2-4. The trial court sentenced petitioner to LWOP. App. 122, ll. 14-22.

At his evidentiary hearing, petitioner maintained that he did not receive notice that the state intended to seek a sentence of LWOP and that he only found out thirty minutes prior to his trial. App. 167, ll. 17-25. Petitioner did not bring up this fact during his sentencing because he did not understand, until much later, that the state had an obligation to serve him prior to trial with this notice. App. 169, ll. 15-20; 170, ll. 1-13.

The solicitor that prosecuted petitioner's case, Barry Barnette, testified that his investigator, Rick Gregory, properly served petitioner and defense counsel with notice of the state's intention to seek LWOP. App. 171, ll. 14-21. He acknowledged that the affidavits of Gregory, stating that he served petitioner and defense counsel, were not notarized until the date of sentencing March 10, 2009. App. 171, ll. 1-9. Mr. Barnette admitted there was no acceptance of service because that was not the policy of his office at the time, and he stated, the person served would be unhappy when receiving this notice. App. 177, l. 17- 178, l. 7. He also admitted that he was not present when Mr. Gregory served petitioner and defense counsel. App. 178, l. 17-179, l. 2

Defense counsel testified that he and petitioner were together when the notice of the state's intention to seek LWOP was served. App. 180, ll. 10-22. Counsel did not know the date of service. App. 181, ll. 10-14.

PCR counsel argued that there was an "irregularity" in this case where the solicitor claimed petitioner and defense counsel were served on February 25, 2009, the affidavits were notarized on March 10, 2009, and the trial transcript reflected a date of trial as March of 2008. App. 165, ll. 1-15. PCR counsel acknowledged that the trial was likely in 2009 and "might be a typographical error" but stated "it certainly puts . . . an indication of an irregularity. App. 165, ll. 16-23.

Discussion

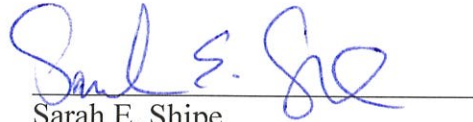
South Carolina law provides, "[w]here the solicitor is required to seek or determines to seek sentencing of a defendant under this section, written notice must be given by the solicitor to the defendant and defendant's counsel not less than ten days before trial." S.C. Code Ann. § 17-25-45(H).

The PCR court erred finding petitioner's assertion that he was not properly served with the state's intention to seek LWOP was refuted where petitioner contended, he was not served with notice of the state's intention to seek LWOP and only found out about it right before trial and where the affidavit of service was notarized weeks after the affidavit alleges petitioner was served. This Court has held that the purpose of the statute is "to assure that a defendant and his counsel have actual notice that the State is seeking a sentence under the recidivist statute at least ten days prior to trial." *James v. State*, 372 S.C. 287, 294, 641 S.E.2d 899, 903 (2007).

Here is it, at best, unclear what happened because of the irregularities in the dates on documents. The affidavit says the notice was served on February 25, 2009 but the affidavit was not notarized until the date of sentencing March 10, 2009. Petitioner testified he did not receive notice from the state and only learned the state was seeking a sentence of LWOP right before trial. While defense counsel claimed he and petitioner were served together, he could not recall what the date of service was and simply referred to the affidavit. Defense counsel's testimony does not refute petitioner's testimony that he found out just before trial. Moreover, the solicitor admittedly was not the person that served petitioner and defense counsel and can therefore not testify regarding the date of service.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of April, 2023.

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RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Johnny Ray Wilkins 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 hearing before Judge G.D. Morgan, Jr., which was held on April 20, 2022, 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 Johnny Ray Wilkins.

Respectfully Submitted,



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of April, 2023.

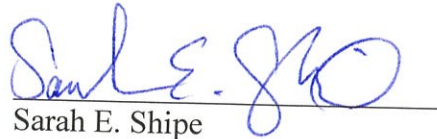
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CERTIFICATE OF COUNSEL

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 13th day of April, 2023.