

The State of South Carolina
In The Supreme Court

Appeal From The Sixteenth Judicial Circuit

John C. Hayes, III Chief Administrative Judge

CASE No: 2012-CO-46-2911

2013-000878

Williz Asbury,

Appellant,

v.

State of South Carolina,

Respondent.

Appellant Rule 243(c) Explanation

Procedural History

Appellant was convicted of murder and kidnaping and

sentence to life imprisonment in September 1993. Appellant timely filed notice of appeal, the S.C. Supreme Court affirmed conviction, State v. Asbury, 328 S.C. 187, 493 S.S.2d 349 (1997).

On April 3, 1998 Appellant filed original application for post conviction relief. An evidentiary hearing was held on March 29, 1999. The lower court denied PCR on February 23, 2000.

In July 2000, Katherine Canauth of the S.C. Appellate Division was appointed to represent the appeal. On September 26, 2000, Katherine Canauth motion to be relieved as counsel was granted. By same order original PCR attorney Allen Bullard, was appointed to represent original PCR appeal.

On October 25, 2001, Allen Bullard motion to be relieved as counsel was granted, and by same order attorney James Morton was appointed to represent PCR appeal.

Attorney James Morton refused to perfect the appeal, and on December 4, 2001 the S.C. Supreme Court dismissed original PCR appeal. On January

14, 2002 Appellant filed his second PCR, requesting an belated appeal of his original PCR claims.

By order dated January 18, 2002 Attorney Michael Matthews was appointed to represent second PCR. On September 20, 2002 Michael Matthews motion to be relieved as counsel was granted.

By order dated October 8, 2002 Attorney Michael Brown was appointed to represent Appellant second PCR. By order dated January 5, 2006 Michael Brown motion to be relieved as counsel was denied.

By order dated March 3, 2006 Appellant Belated Appeal was granted. On August 22, 2006, the S.C. Supreme Court transferred the appeal to the S.C. Court of Appeal.

On September 20, 2007 without serving Appellant notice, the S.C. Court of Appeal denied PCR Appeal. Attorney Michael Brown, counsel of record, failed to perfect the appeal of Appellant original PCR claims.

On September 29, 2009 Appellant filed a petition for habeas corpus in the U.S. District Court. On Septem-

On 03, 2010 Appellant petition for habeas corpus relief was denied. The fourth circuit court of appeal denied review on February 23, 2011.

On October 3, 2011 the U.S. Supreme Court denied certiorari review. On August 21, 2012 Appellant filed this subsequent PCR application.

On March 25, 2013 the lower court issued final order of dismissal, and Appellant timely filed notice of appeal on March 25, 2013. This petition follows.

Arguments

1. Appellant submit that lower court determination that Appellant received a full adjudication of his original PCR claims, thereby, rendering the instant PCR application successive is incorrect.

Appellant submit that on September 20, 2007 the S.C. Court of Appeal denied original PCR appeal, see, Attachment / exhibit #1.

Appellant PCR appellate counsel Michael Brown failed to persuade, by filing an habeas corpus bail, Appellant right to appeal the court denial of his PCR appeal, see Austin v. State, 305 S.C. 453, 409 S.E.2d 345 (S.C. 1991).

Attorney Michael Brown also failed to contact Appellant and advise him that he had a right to appeal the court denial of original PCR appeal.

Appellant submit that S.C. Supreme Court have reiterated this principle in it's Rule 50(c).

1. Reiterating that while barring subsequent petitions on grounds available to, or waived by an appellant in a prior action or petition, the court "contemplated an adjudication on the merits of the original action," see, Gamble v. State, 298 S.C. 176, 178, 329 S.E. 2d 118-19 (S.C. 1984).

Appellant submit that the lower court determination on this issue is un-reasonable and contrary to "Respondent" acknowledgment, that there was no full adjudication of original PCR, because "Appellant did not seek review by the S.C. Supreme Court," of the denial of his original PCR appeal, see Attachment / exhibit # 2.

The lower court also error in it's assertion that Appellant received a full adjudication of his original PCR claims in his federal habeas corpus. Federal habeas corpus was denied on procedural grounds, not on it's merit.

As such, Appellant submit that he never waived his right to appeal the denial of original PCR claims, and the remittitur was returned on October 9, 2007, see, Attachment / exhibit # 3.

1. Appellant submit that because of the many inequities that has occurred (as demonstrated in procedural history), during his judicial process that has denied him due process, Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (S.C. 1996), he is entitled to an evidentiary hearing to challenge trial counsel failure to object to state prosecutor knowing use of false evidence and testimony at his state trial.

Appellant submit that lower court in its determination simply ignored the "unique facts" presented by appellant case.

The question whether trial counsel failure to object to state prosecutor use of false evidence and testimony to obtain appellant conviction, is a question of material fact that is material to appellant innocence or guilt, see, Case v. State, 377 S.C. 475, 289 S.E.2d 413 (S.C. 1982).

Appellant submit that where a statute's, S.C. code § 17-27-90, language is plain, unambiguous, and convey's a clear meaning, (that all grounds in original action must be fully adjudicated), the rule of statutory interpretation are not needed.

1. And the lower court has no right to impose another meaning, see, Wicker v. S.C. Dept. of Loan-
action, 360 S.C. 421, 602 S.E. 2d 56, (S.C. Lewis 198
2004).

Arguments

a. Appellant submit that in Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the court establish that the knowing use by a state prosecutor of false evidence or testimony to obtain a conviction,

"And the deliberate suppression of impeachment evidence that would have impeached and rebutted the false evidence and testimony," constitute a denial of due process, Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565 131 L.Ed.2d 490 (1995).

And such evidence is incompatible with the rudimentary demands of justice, with the same results occurring when the state, although not soliciting false evidence, allows it to go uncorrected when it's appears, see, Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (S.C.1996).

Appellant submit that the similar crimes alleged to by state witness, officer Frank's Sadler (see, PCR application-exhibit #1) in his investiga-

2. Action incident report and trial testimony, is false evidence and testimony, that state prosecutor knew was false and failed to correct when he had a legal duty to do so.

Appellant submit that he is entitled to an evidentiary hearing on the issue, of whether state prosecutor failure to correct false evidence,

(state witness Frank's Sadler false statement to investigator's, and false testimony that appellant had been involved in, and identified by victim's of similar crimes's),

when it appeared and his knowing admitting into state evidence, to be considered by trial jury document's, arrest and search warrant's and affidavit's,

tainted with false evidence denied appellant a fair trial, see, Washington v. State, supra. and Giglio v. United States, supra.

Arguments

3. Appellant submit that state prosecutor knew from it's own witness, evidence custodian John Williams,

that prosecution witness, Donal Girndt, testimony that he remove from the victim back porch a light-bulb, that had appellant fingerprint on it was false testimony and evidence, see, Miller v. Patz, 386 U.S. 1, 87 S. Ct. 785 (1967).

Appellant submit that state prosecutor knew, yet, fail to disclose and suppressed from Brady material, the custodian inventory-list from the crime scene, that did not include a entry of state witness Donal Girndt light-bulb, see, Flowers v. South Carolina Dept. of Highways & Pub. Transp., 309 S.C. 76, 414 S.E.2d 832 (1992), also, Hillman v. Hinkle, 114 F. Supp. 2d 447 (4th Cir. 2000).

Appellant submit that the non-disclosure of the custodian inventory-list, that would

3.

have had a damaging effect on the state key witness credibility, would have change the result of Appellant state trial, in violation of the due process clause of the United States Constitution, see, Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1144, 10 L.Ed.2d 215 (1963).

Appellant submit that the lower court determination were unreasonable, where he is entitled to an evidentiary hearing, to present evidence to challenge trial counsel failure to object to the,

state prosecutor use of false evidence where state witness credibility was material to Appellant innocence or guilt, that would have change the result of Appellant state trial, see, United States v. Kelly, 35 F.3d 927, 937 (4th Cir. 1994).

Respectfully submitted,

Willie Osbey

sworn to and subscribed before me

the 8th day of July 2013

Suzanne H. Frye
NOTARY PUBLIC

My Commission Expires

March 5, 2018

my commission expires _____