

State of South Carolina
In the Supreme Court

RECEIVED

AUG 16 2023

SC SUPREME COURT

State of South Carolina, Respondent,

v.

Billy Ray Smith, # 274409, Appellant.

Appeal from Anderson County
Hon. Eugene C. Griffith, Jr., Presiding

Appellate Case No. 2022-001682
PCR Case No.: 2017-CR-04-041786

Billy Ray Smith, # 274409, Pro Se
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

The State of South Carolina
In the Supreme Court

Appeal from Anderson County
Hon. Eugene C. Griffith, Jr., Presiding

Appellate Case No.: _____

PCR Case No.: 2017-CP-04-041786

Reply to Anders Brief

Introduction

This matter comes by way of appeal of an Order Dismissing Appellant's Application for Post-Conviction Relief (PCR), dated November 21, 2022, by the Honorable Eugene C. Griffith, Jr., presiding judge, and pursuant to an Anders Brief filed by Appointed Appellate Counsel. Appellant alleges the Anders

Brief filed by counsel is without merit, that his appeal is with merit, and that the appeal should be granted for the following reasons, and that appellate counsel should not be relieved.

The Facts

Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. In July, 2014, the Anderson County Grand Jury indicted Appellant for one count each of attempted murder and possession of a firearm during the the commission of a violent crime (2014-GS-04-1278), and one count of obstructing justice (2014-GS-14-1276). Appellant was

subsequently indicted in September 2015 for unlawful possession of a pistol by certain persons (2015-GS-04-1382).

The charges resulted from an incident in which Appellant allegedly shot his wife in the middle of the forehead with an illegally possessed revolver before allegedly hiding the revolver at his son's home. (Tr. pp. 317-318).

Appellant was found guilty by a jury and was sentenced on November 18, 2015 to imprisonment for twenty years for attempted murder, five years for possession of a weapon during the commission of a violent crime, five years for unlawful possession of a pistol by certain persons, and five years for obstruction of justice, all to be served concurrently.

Applicant filed an appeal, which was dismissed, State v. Smith, Op. No. 2017-UP-257 (Ct. App. 2017).

On August 28, 2017, Appellant filed a PCR application and the State filed its Return November 29, 2017. An evidentiary hearing was held before the Honorable Eugene C. Griffith, Jr., who dismissed the application with prejudice on November 17, 2022. It is from such Order of Dismissal that Applicant takes appeal.

PCR Court Interpretation of this Case

The lower court interpreted Appellant's PCR application as presenting the following claims: (1) trial counsel was constitutionally ineffective for not adequately investigating as witness David Hogg, and Nathan Smith ("Nathan");

(2) trial counsel was constitutionally ineffective for not objecting to the jury instruction that malice may be inferred; (3) trial counsel was constitutionally ineffective for not requesting a jury instruction on first-degree assault and battery as the lesser-included offense of attempted murder; and (4) appellate counsel was ineffective for not arguing on appeal that the trial court erred in denying the defendant's motion for a directed verdict as to attempted murder.

At the evidentiary hearing before the PCR court, Appellant's counsel clarified as proceeding upon two claims: (1) that trial counsel was constitutionally ineffective for not properly advising him regarding a

plea offer. Though Appellant narrows this Reply to the below-argued claim, he does not waive any portion of those grounds raised before the lower court and he requests this Court to provide de novo review of the lower court proceedings.

The Instant Case
Question Presented

1. Whether the knowing use of perjured testimony by prosecutor authority taints this conviction?
 - a. Whether solicitor's use of perjured testimony was unlawful,
 - b. Whether PCR counsel's failure to pursue Applicant's evidence of perjury and to present this claim constitutes ineffective assistance of PCR counsel; and,

c. Whether the PCR court's directing conversation away from the subject of perjured testimony and failing to investigate the claim and rule upon it deprived Appellant of Due Process?

d. Whether PCR counsel's failure to file a 59(e), requesting PCR court to rule upon question of perjured testimony deprived Appellant of due process of law and constitutes ineffective assistance of PCR counsel?

In-Court Proceedings - PCR Hearing

On August 14, 2019, Appellant testified before the Honorable Eugene C. Griffith, Jr., during the PCR hearing.

"I have sent him [PCR Counsel Richey] a letter telling him that I would like for

other things to be raised at this hearing, which is not being raised. And, actually, I feel like I need a continuance on this thing altogether and get me an attorney that will testify and do some investigations and find the other two witnesses that never was notified or at the trial.

"And I have with me my transcript, letters from the prosecutor to my attorney, telling me that Ms. Whitney had lied on the stand and --."

"MR. SMITH: Objection, Your Honor. That's hearsay."

"WITNESS: I got a letter from you -- I mean a letter from the State right here. I mean, if it's hearsay, it's black and white. This came to me from y'all. I mean, that's all I've got to say about that. The lady tied on the stand in my case, And I got --"

"The Court: What do you want, Mr. Smith? What are you talking about, asking for a continuance in this case?"

"THE WITNESS: Here's the letter I wrote, Your Honor, to Richard Shirley about my case and how I've been represented and I was asking for another attorney then...." (Tr. pgs. 12(ln.20) to 14(ln.3)).

Argument and Authority

"... I have had a brain aneurysm. Everybody in here knows that was at the trial. I have a hard time remembering stuff. That's why I write down and bring so much with me." (PCR Tr., pg. 12, lns. 5-8). This reflects the mental acuity of Appellant who was on the PCR witness stand, attempting a third way to get someone to pay attention to the

fact that the prosecutor in his case stated in writing that "Ms. Whitney had lied on the stand." (PCR Tr., pg. 13, lns. 9-10). The testimony now under review shows Appellant had requested his PCR attorney to raise the issue. He then asked Mr. Shirley via letter for another attorney because Mr. Richey would not raise this issue, among other things. Finally, Appellant brought it to the attention of the PCR Court, who walked the Appellant away from the issue by discussing what he wanted out of this argument, not the claim itself. Appellant became confused and strayed away from Ms.

Whitney's perjury into unrelated perjuries by his son. Appellant's PCR counsel never offered the letter which was in Appellant's possession, the judge never asked for the evidence being offered by the Appellant, and matters moved on, never to be revisited or ruled upon.

Case Law Argument:

"A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's judgment." U.S. v. Bagley, 473 U.S. 667, 678, 105 S.Ct.

3375, 87 L.Ed.2d 481 (1985), cited in Simpson v. Moore,
367, S.C. 587, 627 S.E.2d 701 (SC 2006). The knowing use
of perjured testimony is subject to the materiality
standard review: 'Evidence is material only if
there is a reasonable probability that, had the
evidence been disclosed to the defense, the result
of the proceeding would have been different.'
Id., at 682, 105 S.Ct. 3375.

"A reasonable probability of a different outcome
is accordingly shown when the government's evidentiary
suppression undermines confidence in the outcome
of the trial." Kyles v. Whitley, 514 U.S. at 432-36,

115 S.Ct. at 1565-66, 131 L.Ed.2d, at 505-06 (internal quotes omitted); accord State v. Dohlen, 322 S.Ct. at 241, 471 S.E.2d at 693. The court must consider the suppressed evidence collectively, not on an item-by-item basis. Kyles, supra, Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999),

Ineffectiveness of PCR Counsel:

"The PCR judge did not rule on whether [perjured testimony altered the outcome of the trial]. [Appellant's counsel] did not file a Rule 59(e), SCRPC, motion requesting a ruling on these issues. Accordingly, petitioner's claims regarding [perjured testimony] are not

preserved for review". Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), citing Fruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992).

Judicial Economy:

Appellant has herein preserved the argument of PCR Counsel's ineffectiveness for not filing a Rule 59(e) motion requesting a ruling on the perjured testimony allegation after a full and fair hearing on this issue; but, that preservation of ineffective PCR Counsel is at the federal level. Martinez v. Ryan, 566 U.S., 132 S.Ct. 1309 (2012). Presently, it would appear that federal relief may be granted. Thus, Appellant suggests that, in the name of judicial

economy this Court remand this case to the lower court on the issue of perjured testimony by Mrs. Whitney and a ruling on this issue. Otherwise, same will be granted at the federal district court at great expense to all.

Conclusion

Wherefore, Appellant prays that this Court remand this case to the lower court to review, conduct hearing, and adjudicate the issues surrounding this perjured testimony, and that this court grant any such and further relief as deemed appropriate and just.

[Signature block on next page].

-16-

Respectfully Submitted:

Billy Ray Smith
Billy Ray Smith, #274409, A10 Se
Pony Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

Dated: 8, 9, 2023