

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Jasper County

Honorable Carmen T. Mullen, Circuit Court Judge

ANTONIO SCOTT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001186

PETITION FOR WRIT OF CERTIORARI

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The PCR judge who signed the final order of dismissal erred in failing to recuse herself when she was the trial judge and both judges, the judge who signed the conditional order of dismissal and the judge who signed the final order of dismissal, erred in dismissing the application for post-conviction relief as being filed outside the one-year statute of limitations without appointing counsel and without conducting a hearing when there is evidence in the record that Petitioner, an unrepresented indigent party, mailed the application from the South Carolina Department of Corrections to the Jasper County Clerk of Court, at the correct address, presenting issues of law and fact that entitle Petitioner to the appointment of counsel and an evidentiary hearing on the statute of limitations issue as well as ineffective assistance of counsel claims.....4

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ISSUE PRESENTED

Did the PCR judge who signed the final order of dismissal erred in failing to recuse herself when she was the trial judge and did both judges, the judge who signed the conditional order of dismissal and the judge who signed the final order of dismissal, court err in dismissing the application for post-conviction relief as being filed outside the one-year statute of limitations without appointing counsel and without conducting a hearing when there is evidence in the record that Petitioner, an unrepresented indigent party, mailed the application from the South Carolina Department of Corrections to the Jasper County Clerk of Court, at the correct address, presenting questions of law and fact that entitle Petitioner to the appointment of counsel and an evidentiary hearing on the statute of limitations issue as well as ineffective assistance of counsel claims?

STATEMENT

In April of 2011, the Jasper County Grand Jury indicted Petitioner, Antonio Scott, for murder, indictment #2011-GS-27-00216. (App. pp. 233-234). On December 5, 2011, Petitioner proceeded to jury trial before the Honorable Carmen T. Mullen. Robert Hughes represented Petitioner at trial. Robert Ferguson prosecuted the case. The jury found Petitioner guilty. Judge Mullen sentenced Petitioner to thirty (30) years in prison. (App. p. 235). A timely notice of intent to appeal was filed and the direct appeal perfected. On February 19, 2014, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Scott, 408 S.C. 21, 757 S.E.2d 533 (Ct.App. 2014). (App. pp. 275-280). A timely petition for rehearing was filed and then denied on May 2, 2014.

On May 20, 2014, Petitioner filed a petition for writ of certiorari with the South Carolina Supreme Court. On September 11, 2014, the South Carolina Supreme Court granted the petition for writ of certiorari. After hearing argument, the Court affirmed. State v. Scott, 414 S.C. 482, 779 S.E.2d 529 (2015). (App. pp. 281-287). A timely petition for rehearing was filed and then denied on December 16, 2015. The remittitur issued on December 16, 2015.

In a letter to the Clerk of the South Carolina Supreme Court dated September 9, 2021, Petitioner wrote that he filed an application for post-conviction relief [PCR] with the Jasper County Clerk of Court on January 15, 2016. (App. pp. 288-292). Petitioner wrote that he filed an amended application in April of 2016. (App. p. 288). Petitioner also stated that he had not received responses from the Jasper County Clerk of Court. (App. p. 289). The Appendix includes an inmate receipt for postage for legal matters dated January 15, 2016. (App. p. 292). In a letter dated September 15, 2021, the Clerk of the South Carolina Supreme Court forwarded Petitioner's letter to the Jasper County Clerk of Court. (App. p. 293). In a letter dated

September 30, 2021, the Jasper County Clerk of Court wrote to Petitioner and advised that her office did not have a PCR application on file. (App. p. 295). The clerk advised Petitioner to resubmit the application and included a blank PCR application. (App. p. 295). On October 12, 2021, Petitioner filed a PCR application and amendment. (App. pp. 296-313).

On January 25, 2022, the State filed a return and motion to dismiss. (App. pp. 314-325). The State did not request the appointment of counsel. (App. p. 314). On February 8, 2022, Petitioner filed a *pro se* motion to dismiss conditional order of dismissal. (App. pp. 338-341). On February 11, 2022, the Honorable Bentley Price signed a conditional order of dismissal. (App. pp. 326-337). On April 25, 2022, Petitioner filed a *pro se* proposed amendment. (App. pp. 343-345). Additionally on April 25, 2022, Petitioner filed a *pro se* motion for leave to amend. (App. pp. 346-348). On August 1, 2022, Petitioner filed a *pro se* objection to the conditional order of dismissal, a *pro se* proposed amendment, a *pro se* motion to dismiss conditional order of dismissal by the Respondent, and a *pro se* motion for leave to amend. (App. pp. 353-365).

On June 19, 2023, the Honorable Carmen T. Mullen signed the final order of dismissal without appointing counsel and without conducting a hearing. (App. pp. 366-368). Judge Mullen was also the trial judge. (App. p. 1). On July 5, 2023, Petitioner filed a *pro se* objection to the proposed final order of dismissal. (App. pp. 369-373). On July 26, 2023, Petitioner filed a timely *pro se* notice of intent to appeal. (App. p. 374). On August 7, 2023, Petitioner filed a *pro se* Rule 243 explanation. (App. pp. 375-377). This petition for writ of certiorari follows.

ARGUMENT

The PCR judge who signed the final order of dismissal erred in failing to recuse herself when she was the trial judge and both judges, the judge who signed the conditional order of dismissal and the judge who signed the final order of dismissal, erred in dismissing the application for post-conviction relief as being filed outside the one-year statute of limitations without appointing counsel and without conducting a hearing when there is evidence in the record that Petitioner, an unrepresented indigent party, mailed the application from the South Carolina Department of Corrections to the Jasper County Clerk of Court, at the correct address, presenting issues of law and fact that entitle Petitioner to the appointment of counsel and an evidentiary hearing on the statute of limitations issue as well as ineffective assistance of counsel claims.

Petitioner's PCR application was dismissed without an attorney being appointed and without a hearing. The judge who signed the final order of dismissal also presided over Petitioner's trial. (App. p. 1, p. 368). First, the judge who signed the final order of dismissal should have recused herself. In Floyd v. State, 303 S.C. 298, 299, 400 S.E.2d 145, 146 (1991), the South Carolina Supreme Court wrote, "Accordingly, in all post-conviction relief hearings held after the date of this opinion, a judge shall, *upon motion*, recuse himself if he was the judge who presided at the guilty plea, criminal trial, or probation revocation proceeding for which relief is being sought. While Petitioner did not move for the judge to recuse herself, Petitioner was acting *pro se*, an attorney was never appointed to represent Petitioner and no hearing was held. The final order of dismissal omits reference to the trial judge's name but purports to rely on the conditional order of dismissal which clearly notes the trial judge's name.

Second, Petitioner wrote in his letter to the Clerk of the South Carolina Supreme Court dated September 9, 2021, that he timely mailed his PCR application to the Jasper County Clerk of Court on January 15, 2016. (App. pp. 288-290). The remittitur issued on December 16, 2015. Petitioner additionally stated that he filed an amended application in April of 2016. (App. p. 288). In the letter Petitioner additionally provided the address where he sent his application and amendment, the correct address for the Jasper County Clerk of Court. (App. p. 290). The

Appendix includes an inmate receipt, with Petitioner's name and SCDC number, for postage for legal matters dated January 15, 2016, the same date he states that he sent the application. (App. p. 292). Petitioner presented material questions of law and fact regarding the statute of limitations.

In response to Petitioner's *pro se* PCR application, the State moved to dismiss as untimely pursuant to S.C. Code §17-27-45. (App. p. 314). In the caption of the return the State noted that appointment of counsel was NOT requested. (App. p. 314). In the conditional order of dismissal the PCR judge wrote:

This Court has reviewed the pleadings, the records submitted by the parties, and the applicable law. This Court finds there is no genuine issue of material fact which would necessitate an evidentiary hearing. *See* § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief. Pursuant to South Carolina Code Annotated Sections 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application based upon the following findings:

(App. p. 333). The order goes on to discuss the statute of limitations. (App. pp. 333-335). In footnote #3 of the conditional order, the PCR judge acknowledged Petitioner's letter to the Clerk of the South Carolina Supreme Court in which he states he mailed a copy of his PCR application to the Jasper County Clerk of Court in January of 2016. (App. p. 328). The order also lists seven allegations of ineffective assistance of counsel, a Brady violation and a Due Process violation that were all included in Petitioner's *pro se* PCR application. (App. p. 332).

The final order of dismissal acknowledges Petitioner's numerous *pro se* responses to the conditional order of dismissal. (App. p. 367). The PCR judge who signed the final order of dismissal denied relief and dismissed with prejudice "for the reasons set forth in the Court's Conditional Order of Dismissal . . ." (App. p. 368). Both PCR judges erred in dismissing the

application without appointing counsel and conducting a hearing when there were material issues of law and fact presented with regard to the statute of limitations.

In Mose v. State, 420 S.C. 500, 505–06, 803 S.E.2d 718, 720 (2017), the South Carolina Supreme Court wrote:

“Summary dismissal of a PCR application without a hearing is appropriate only 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); S.C. Code Ann. § 17-27-70(b), (c) (2014). When considering the State's motion for summary dismissal of an application, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. Leamon, 363 S.C. at 434, 611 S.E.2d at 495. When reviewing the propriety of a dismissal, an appellate court must view the facts in the same fashion. Id.

The PCR judges erred in summarily dismissing the application without appointing counsel and conducting a hearing. Petitioner presented material issues of law and fact that required a hearing. The PCR judges failed to assume that the facts presented by Petitioner were true and failed to view those facts in the light most favorable to Petitioner. Petitioner’s statement that he timely filed his PCR application is additionally supported by the record showing a receipt for postage on the date he mailed his application. Additionally, it is not apparent on the face of the application that Petitioner was not entitled to relief. The *pro se* PCR application alleges seven instances of ineffective assistance of counsel, a Brady violation and a Due Process violation. (App. p. **).

In Gary v. State, 347 S.C. 627, 630, 557 S.E.2d 662, 664 (2001), Petitioner, an indigent unrepresented party, told the judge during the hearing that he timely filed his PCR application but filed it in the wrong place. On appeal Petitioner argued that the appellate court should allow equitable tolling of the statute of limitations. The South Carolina Supreme Court found that the

issue was not raised below and not properly before the appellate court. The Court, however, citing Rule 71.1, SCRCF, found that the hearing was inadequate and remanded for the appointment of counsel.

Rule 71.1(d) provides that:


If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given a reasonable time to confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.

The Court in Gary wrote, “Further, in the interest of fairness, we find counsel should be appointed under Rule 71.1(d) when the State moves for dismissal under § 17–27–45(A) and the PCR applicant raises an issue of material fact regarding the applicability of the one-year limitation.” 347 S.C. at 630, 557 S.E.2d at 664.

In the present case Petitioner presented questions of law and fact with regard to the statute of limitations. Petitioner, however, was not given a hearing and was not appointed counsel. This Court should remand the case for appointment of counsel and an evidentiary hearing as the Court did in Gary.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari and remand for the appointment of counsel and an evidentiary hearing.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of February, 2024.