

The Supreme Court of South Carolina

Terrell McCoy, Appellant

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MAY 24 2024

S.C. SUPREME COURT

v.

The State, Respondent

Appellate Case No. 2023-001680

Appellate Case No. 2024-00061

(15) Petition for Rehearing ; Rehearing En Banc

(a) AND MOTION TO CONSOLIDATE

Pursuant to Rule 221 (a) (c), "Petitioner" move for Rehearing base on the clerk of appellate court mistake in filing Petitioner's Petition for Writ of Certiorari under a case number which is not the correct filings and the facts that under Rule 201 SCACR (b), where a party aggrieved by an order from the lower court, appeal.

This Court has misapprehended Petitioner's facts and the law that support his Constitutional violation.

The Clerk of Court filed the October 18, 2023 Petition for Writ of Certiorari [appellate case number 2023-001382]

under appellate case number 2023-001680.

This was a mistake. On October 24, 2023, this Court granted Petitioner's Motion for leave, under SCRPC Rule 60(B), to return back to the lower court for a ruling

LEGAL MAIL

on his pending Rule 59(e) SCRCP, motion. See Exhibit 1. Prior to this Court granting the "Motion for leave", Petitioner mailed his Petition for writ of Certiorari to this Court. [see the Caption Case number on the October 18, 2023]. The petition for writ clearly states appellate Case Number 2023-001382.

However the clerk filed the petition under appellate Case Number 2023-001680. Petitioner filed a notice of appeal for the denial of SCRCP Rule 60(B) motions on September 5, 2023, (See: Exhibit 2) pursuant to Rule 201, SCACR

On September 6, 2023, the case was assigned the appellate Case number 2023-001382. See Exhibit 3

For these reasons petitioner request a rehearing and rehearing En banc where under SCACR Rule 203(d)(ii) this Court should have transfer the case to the Court of appeals "only" "if" this Court finds that the Constitutional issues raised is not a "significant" one.

See SCACR Rule 201(a)(b)

Petitioner has a procedural right to appeal an order, denying his Rule 60(B) motions. See Hendricks v. State, 387 S.C. 221, 692 S.E.2d 892 (2010)

However, the Constitutional issues raise in the petition is indeed a "significant" one, and fundamental fairness shocking to the universal sense of justice. The judge abused it discretion in denying the Rule 60(B) motions.

See: Chewning v. Ford Motor 354 S.C. 72, 579 S.E.2d 605.

But see: Butler, 302 S.C. 408, 397 S.E.2d at 88;
See also Simmons v. State, 322 S.C. 49, 431 S.E.2d 455 S.E.2d 455 (1993).

In this case, a "defect in the integrity" of the post conviction proceeding which requires setting aside the Judgment.
Russell v. State 2021 WL 536306, Rule 60(b)

The attorney general office is aware of misconduct by the 9th Circuit solicitor's Burns Wetmore and Peter McLoys.

See: Small v. State 422 S.C. 174, 810 S.E.2d 836, (2018) (The Supreme Court would review questions of law de novo with no deference to the PCR Court).

In this case, the PCR Judge Deadra Jefferson denied Petitioner's procedural due process to prove by preponderance of evidence that appointed public defender was ineffective for failure to subpoena witnesses as directed by Honorable Marklug Dennis, and failure to obtain evidence. See: Rule 71.1 (e), S.C. Code § 17-27-20 through 17-27-90. See: Strickland v. Washington 466 U.S. 668, 687-88, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)
Cherry v. State 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989)

Prior to the December 14, 2015, the state requested a Summary Judgment hearing. The hearing was held on September 9, 2015. See: September 9, 2015, Summary Judgment hearing transcript.

During the Summary Judgment hearing, PCR Counsel Rodney Davis argued trial counsel failed to subpoena witnesses as directed by Judge Dennis. See: September 9, 2015 hearing transcript pages: 8 line 3-11 through pages 16 line 1-12

The lower court overlooked the facts the state did not appeal the Judge ruling "Ms. Proctor's last administrative duty was to subpoena Petitioner's witnesses." See January 27, 2009 transcript pages: 29 line 8-18. See Exhibit 4

Failure to appeal Judge's order, it became the law of the case. See: Dreher v. South Carolina Dept. of Health and Environmental Control, 412 S.C. 244, 772 S.C. 2d 505 2015.

Trial Counsel failed to subpoena Jenie Fowler, (NCPD 911 Dispatcher)
During Petitioner's trial, appointed public defender Lorelle Proctor mis-
representation can be shown, where she states "There are two
Jenie Fowlers, but we subpoenaed the wrong one. See February
2, 2009 trial transcript pages 632 4-25; pages 633 line
- 25; pages 634 line 1-25; pages 635 line 1-25; and pages
636 line 1-6) Exhibit 5

Affendant discovered evidence prove there was only one Jenie Fowler
that work at North Charleston police Department. See letter of Beth
Woodall and Subpoena for Jenie Fowler. See Exhibit: 6

The PCR Judge denied Petitioner's due process, and equal protect-
ion to call public defender as a witness under S.C. Code 17-27-
45, 71.1. SCRPC to prove public defender was ineffective. Exhibit 7

The PCR court unreasonably ruled trial counsel was effective
under Strickland standards without conducting a hearing. There
is no record public defender articulated a strategy for not
subpoena Jenie Fowler. This is a defect in the integrity
of the Post Conviction Proceeding under Rule 60(B)

Under Strickler v. Greene 527 U.S. 263, 281-82, 119 S.Ct 1936
144 L.Ed. 2d 286, the Judge failed to consider the "cause"
and "prejudice" requirement when suppressed evidence is mater-
ial. Brady v. Maryland Id.

Jenie Fowler is reliable. See Navarette v. California 572 U.S.
393, 134 S.Ct. 1683, 188 L.Ed. 2d 630 (2014) (Four Factors in
reliability of a 911 Caller) (1) Eye witness knowledge of allege-
dly dangerous activity lending significant support to the tips rel-
iability, Id at 1689. (2) the caller made a statement about
an event "soon after perceiving that event"; rendering the
statement especially trustworthy, Id, (3) the caller used
the 911 system which has some features that allow for ident-
ifying and tracing callers, and thus provide some safeguards

against making false reports, and (4) the caller reported
Created reasonable suspicion of an ongoing and dangerous
Crime in this case [murder]

Under Navarette v. California, Id. (The 911 call is anonymous
when only the 911 operator knows the caller identity)

Trial counsel was ineffective in failure to obtain the 911 caller
identification during the (3) three year period of representation.
The State objected to the admission of the CAD dispatcher's re-
port, base on not knowing who the caller was. See February
2, 2009 trial transcript pages: 633 line 20-25; pages 635
line 6-17 Exhibit 6

The trial judge sustained the state's objection.

During the evidentiary hearing, PCR counsel introduce Affidavit
of Kriston D. Neely, and the March 25, 2006 CAD dispatcher's re-
port into the record. See December 14, 2015 PCR hearing tran-
script pages: 39 line 4-25, page 40 line 1-9; page 51 line 8-25

The affidavit of Kriston D. Neely is newly discovered, as the
legal department for the City of North Charleston admitting a 911
tape for the March 25, 2006 murder existed but was destroyed
on June 25, 2006. See Exhibit 8; Exhibit 9. This was
material facts not presented at trial under S.C. 17-27-45

The trial judge ruled a 911 tape did not exist, and failed
to give an adverse Jury instruction under S.C. Article V Section
21. See: February 2, 2009 trial transcript page 636 line 1-6;
pages 653 line 13-25 and page 654 line 1-5

The PCR court ruled, no Brady violation occurred, and that
the suppress evidence was not in the possession of the state. See
June 14, 2014 Amended Order, and order denying Rule 59(e)

This is an defect in the integrity of the PCR proceed-

ing where under Brady v. Maryland 363 U.S. and Kyles v. Whitley 514 U.S. 419, 421, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) The evidence was in the possession of the government.

During the PCR hearing, PCR counsel called Solicitor Burns Wetmore as a witness and the State objected. The PCR Judge sustained the State's objection, and denied Petitioner's procedural due process under Rule 71.1 (e) and S.C. code 17-27-45. See: December 14, 2015, PCR hearing transcript pages: 36 line 14-21. Exhibit 1

The general assembly has provided a specific procedure to be followed in PCR cases, and that method is inconsistent with the more general procedure of the SCRPC, the statutory procedure must be followed. Rule 71.1 SCRPC ("The procedure for Post Conviction Procedure Act S.C. Code Ann. §§ 17-27-10 to 120 (1985) The South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the Act")

See Rule 60(B) SCRPC.

Petitioner's Rule 60(b) motion was timely. The S.C. Court of Appeal denied Petitioner's PCR Appeal on May of 2022. Petitioner filed his first Rule 60(b) motion on June of 2022.

Res judicata does not apply in this case. See Brown v. Allen 344 U.S. 443, 458; McCleskey, 499 U.S., at 479, 111 S.Ct. at 1462

The misconduct by the adverse party prevented Petitioner from fully presenting his defense. See Schultz v. Butcher 24 F.3d 626, 630 (4th Cir. 1994) (1) police suppress 911 tape; (2) Suppress the identity of 911 caller (3) Lied about the subpoena for Jenie Fowler (4) and 911 caller identity and information was reliable. All the above was precluded from Petitioner's trial.

Ms. Proctor misrepresentation under Rule 60(b)(3) prevented Petitioner from obtaining reliable evidence which was material to impeach the state evidence, and fully presenting his defense.

The state relied on the testimony of an untruthful witness, Cere-nda Snowden who gave false statement(s) to police under Franks v. Delaware. 438 U.S. 154, 98 S.Ct. 274, 57 L.Ed. 2d 667 (1978) Exhibit 11

Compelling reason exist. See Gibson, 329 S.C. at 42, 495 S.E.2d at 429.

On April 27, 2009, Petitioner was able to obtain an affidavit of Terrence Prizzie. See affidavit of Terrence Prizzie. Exhibit 12

Terrence Prizzie testimony would change the result if a new trial was granted; has been discovered since trial; and could not not by exercise of due diligence been discovered due to trial Counsel Ineffectiveness. Terrence Prizzie testimony is material to the issue of innocence, and is not merely cumulative or impeaching. See: Underwood v. State 309 S.E.2d 560 425 S.E.2d 20 (1992) Strickland v. Washington Id.

S.C. Code ann § 17-27-45.

Terrence Prizzie statement is reliable and states i, (Petitioner) was in Atlanta, Georgia on March 24, 2006, and March 25, 2006 on the date the victim Antwan Bryant was killed.

Petitioner timely filed a Rule 60(b)(2) motion, and Rule 15 (b) SCRP motion, and the lower court abuse its discretion in denying a hearing. See: Exhibit 13.

Petitioner timely filed a notice of appeal. The case has been assigned appellate Case 2024-000601. For these reasons Petitioner motion to Consolidate appeal. The Rule 60(b)(2) and Rule 59(b) were filed. See Exhibit 14

See: Exhibit 15 The judge's order, without a hearing, on newly discovered evidence.

See also Exhibit 16.

The affidavit of Terrence Prizzie buttress Tonia Theus trial testimony. See Feb. 2. 6. 2009 transcript pages 624-630. See Exhibit 17

The state stated during closing arguments, that Tonia Theus only testified to seeing petitioner pack his clothes and CDs, and told her he was going to Atlanta on March 24, 2006, and that she could not testify he was in Atlanta on March 25, 2006.

Had trial counsel investigate Terrence Prizzie and subpoena him to trial, this evidence would created doubt, along with the suppress material evidence, Jenie Fowler, the 911 caller, and the CAD dispatcher's report which constitutes reliability.

Under U.S. Const. amend XIV, § 1 ("All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.") See S.C. Const. Art. 1, § 3. (The privileges and immunities of citizens of this state and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of laws.")

Lastly trial counsel (public defender) was ineffective for failure to object to the Judge declaring a mistrial during his first trial. There was no "manifest necessity" to declare a mistrial, and the Solicitor Burns wetmore nor public

defender has order the full first trial transcript.

During PCR, PCR counsel called Lorelle Proctor and Burns Wetmore as witnesses, and the state objected. The PCR Court deprived Petitioner of his procedural due process to prove his burden by a preponderance of evidence under 71.1.(e) S.C.R.P. Where Petitioner was placed in jeopardy twice in violation of the Fifth Amendment & Fourteenth Amendment. Compelling reason exist. See Modern Finance Co. v. Hicks, 235 S.C. 110 S.E.2d 859 (1959)

See: Russell v. State 2021 WL 5356306; Bouvet v. Bouvet 388 S.C. 301 308, 696 S.E.2d 204, 207 (Ct App. 2010) (The decision to grant or deny a motion made pursuant to Rule 60 (b) is within the sound discretion of the [PCR Court] Mang-21 v. State 421 S.C. 85, 92, 805 S.E.2d 568, 571 (2017) (on review of a PCR Courts resolution of procedural questions arising under the South Carolina Rules of Civil procedure, we apply an abuse of discretion standard") Bouvet, 388 S.C. at 308, 696 S.E.2d at 207 ("An abuse of discretion occurs when the order of the PCR court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support") Id at 309, 696 S.E.2d at 208.

Here, The PCR Court unreasonably determined that trial counsel was effective without holding an hearing to properly consider if Counsel articulated a reason to meet the Strickland v. Washington standard. The PCR Court determined petitioner failed to call Lorelle Proctor as a witness, and ignored the facts that PCR Counsel did called Lorelle Proctor and Burns Wetmore as a witness and

the State objected. See: December 14, 2015 PCR hearing transcript pages: 4 line 7-25 through pages 7 line 1-16; pages 36 line 14-21.

See: June 14, 2019 Amended Order pages:

The Court of appeals obviously ignored controlling law under Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998) (This court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness's failure to testify at trial.)

The CAD Dispatcher's report was offered into the PCR record, to establish prejudice from the witness's failure to testify. The CAD dispatcher's report was reliable under Navarrette v. California, 572 U.S. 393, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2011) To put the case in a different light and cast doubt. The state relied on testimony from an untruthful witness who intentionally and recklessly gave false statements to police in violation of Franks v. Delaware Id., See Exhibit II

Trial counsel was ineffective under Strickland, A defect in the integrity of the PCR proceeding precluded Petitioner from his burden of proof under Rule 11.(e) and S.C. Code § 17-27-10 to 17-27-90, which requires setting aside judgment.

The PCR Court Amended Order is void, where Petitioner was denied his due process right to call witnesses at his first and only PCR hearing. Under Love v. State, 428 S.C. 231 834 S.E.2d 196 (2019). A void order is one rendered in the absence of proper due process. See Universal Benefits, Inc v. McKinney

349 S.C. 179, 561 S.E. 2d 259 (ct app. 2002)

The effective assistance of counsel is a necessary requisite of due process of law. State v. Cowart 251 S.C. 360, 162 S.E. 2d 535 (quoting Strickland v. Washington See Brady v. Maryland)

A procedural due process claim consist of two elements: (i) deprivation by state action of protected interest in life, liberty, or property and (ii) inadequate state process. See: Zinermon v. Burch 494, U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed. ad 100 (1990)

(Importantly, the Court has state that procedural due process claim is not complete when the deprivation occurs. "Id., at 126, 110 S.Ct. 975. Rather, the claim is complete "only when" the state fails to provide due process)

This case meets the two elements, This Court has overlooked these facts, and a de novo review of the petition for Writ of Certiorari and appendix is necessary, where there has been a violation which, in the setting constitutes a denial of fundamental fairness shocking to the universal sense of justice. Butler, 302 S.C. 408 397 S.E. 2d at 88; See also Simmons v. State, 322 S.C. 49, 431 S.E. 2d 455 (1993) See: Gibson 329 S.C. at 42, 495, S.E. 2d at 429 (Finding that upon remand if petitioner can show "PCR is unavailable, all other remedies have been exhausted, and the issues raised could not have been raised in their prior applications, the lower court may treat the application as habeas Corpus petition, and provide a hearing on their Constitutional claim (emphasis added). Nor does it mean an order of that Court declining to exercise its original jurisdiction operates as a ruling on the merits for purposes of res judicata.

Conclusion

For these reasons stated above, Petitioner request this Court review Petitioner's petition for Writ of Certiorari denovo, and the Appendix, and grant a new trial or PCR hearing to raise the ineffective assistance of Counsel claims, where it is apparent this Court overlooked the material facts that Judge Markley Dennis ordered trial Counsel's last administrative duty to Subpoena Petitioners witnesses. (See Exhibit 4, January 27, 2009 hearing pages 29 line 8-18; and the state did not appeal Judge Dennis Order.

PCR Counsel amended PCR application, and included all ineffective assistance of trial Counsel claims. See Exhibit 10, and PCR Judge abuse its discretion by not allowing Petitioner to call hovelte Proctor as a witness. to prove by a preponderance of evidence trial Counsel was ineffective under the two prongs in Strickland v. Washington

If the record is established, based on hovelte Proctor misrepresentation that there were two Jenie Fowler and she subpoena the one, during the trial, (See Exhibit 5) and Exhibit 6, This Court has authority recall its mandate, vacate the PCR Judges orders denying relief and grant a new trial. Petitioner renew his motion for appeal, based on the above Constitutional violations, and defect in the integrity of PCR proceedings.

dated May 18, 2023