

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Russell Montgomery,

Petitioner,

-VS-

THE STATE OF SOUTH CARLOINA

Respondent.

RECEIVED

SEP 3 - 2013

S.C. SUPREME COURT

**PETITION FOR WRIT OF CERI
OF THE SOUTH CARLOINA SUPREME COURT**

Russell Montgomery, 294838
Lieber C.I. Wando C-261
P.O. Box 205
Ridgeville Sc. 29472
Petitioner ,
pro se.

Alan Wilson
Attorney General for the
STATE OF SOUTH CARLOINA
P.O. Box 11549
Columbia, Sc 29211
Respondent.

Procedural History

On 2-21-2006, the Appellant filed his first post-Conviction relief Application alleging numerous issues of ineffective assistance of counsel and errors of law of which he is currently being held in custody unlawfully. After filing his original Post-Conviction Relief Application, Appellant was appointed Counsel and afforded an evidentiary hearing to determine the validity of the Allegation raised by him. Appellant's original evidentiary hearing was presided over by the honorable James C. Williams, on 1-12-2007. After presenting the facts regarding the merits of his Allegations the court stated that it would take the matter under consideration and issue its decision at a later date.

On 2-26-2007, Appellant's first (PCR) court issued it's order denying him relief. However, the order issued by the court failed to address every issue raised in his application and argued before the court as is required by law appellant there after filed on appeal of his Post-Conviction Relief proceeding. On 1-30-2009, Unfortunately, Appellant's efforts were in vain as his petition for certiori review was denied and the merits of his appeal were never heard.

Subsequently, the appellant filed a second Post-Conviction Relief application on 7-20-2011, Arguing that he was denied his right to due process during his first filing because all of his issues raised in the Application and argued before the original (PCR) court were never ruled upon. Appellant argues that his second filing was not a successive Application but rather an attempt to have his first proceeding fully adjudicated. However, the respondent, moved for dismissal and submitted a "conditional order of Dismissal" on 11-13-2012, Arguing that Appellant was attempting to file a second or successive application for Post-Conviction Relief for

the purpose of arguing issue appellant Failed to raise in his First (PCR) proceeding.

Facts

On 4-1-2013, Appellant filed a response to the Respondent's "Conditional order of Dismissal" explaining to the court that this was not attempt to file a second or successive Application, but Rather an effort to correct a gross miscarriage of justice.

Issue on Appeal

On November 13, 2012 the courts issued a conditional order of Dismissal, dismissing Applicants post-conviction relief petition. The applicant was served with the court's order on December 27, 2012 and advised that he had twenty (20) days to provide this court with sufficient reason why this order should not become final, therefore the applicant now submits the reason as well as law he feels are sufficient.

On page five (5) of the courts order it state that: "the Applicants delay has greatly prejudiced the respondent" and that "it is questionable whether the attorney's will remember the case and whether the files will be available." the court made this assessment based on the belief that the applicants(PCR) filing is a delayed filing this is apparent Based on the courts finding on page five (5) of its order which states : "If the applicant had sought Post-Conviction Relief within a reasonable time after his trial neither of these problems would exist.

Therefore, the court intends to summarily dismiss the Application based on the Applicants Lack of diligence in processing his claim for relief. In the finding of facts, and conclusion of Law on" on page three(3) of the courts order, the court finds the applicant's filing to be a successive application for Post-Conviction Relief, and because of this , determines that it must be dismissed by Law, S.C Code Ann.§17-27-90. However, the court makes this finding on the assumption that the issues raised by the applicant are new issues that could have or should have been raised in his first application for Post-Conviction Relief.

What the court has failed to understand is that these are not new issues or issues that have been waived. The issues Applicant has argued in this second filing, were in fact raised and argued at his original evidentiary hearing . Unfortunately,

the Judge presiding over that hearing failed to address several of the issues argued and failed to make “ specific finding of facts” Concerning those issues.

Applicant's Counsel during his original Post-Conviction Relief evidentiary hearing failed to file a timely rule 59(E) Motion regarding the issues that had not been ruled upon, there by denying the applicant a “Full bite at the Apple.” This denied him the fundamental protection of due process of Law under Both the South Carolina Constitution and the Constitution of the United States.

The Applicant's position is not that he should be granted a second Post-Conviction Relief hearing to argue new issues, but rather to decide the issues raised and argued to the court in his original evidentiary hearing, but which were never ruled upon. The Applicant's original evidentiary hearing record is completely in tact and available to resolve this matter, the original PCR court failed to address each and every issue raised and argued before it as is required by S.C. Supreme Court precedence. See Marlar Vs. State.

Argument

Because the issues raised in the original Application were properly raised in compliance with S.C Code Ann.§ 17-27-90. And because all applicant's are entitled to a “full and fair opportunity to present their claims” and to have them fully Adjudicated, this court should reverse it's “Order of Dismissal” and allow Applicant's “Left-over issues to be decided in accordance with law. “Successive Application are permitted in rare procedural circumstances, “Carter V. State, 293 S.C. 528, 362 S.E 2d 20(1987) Case V. State, 277 S.C. 274, 289 S.E. 2D 413 (1982).

Denial of due process occurs when a criminal defendant is denied

fundamental Fairness essential to the concept of justice State V. Hornsby, 326 S.C 121, 484 S.E. 2D 869 (1997). (Emphasis Added) "A judge has a responsibility for safe guarding the rights of the accused. "State V. Stanley, 365 S.C 24. 615 S.E 2d 455 (2005)." the court has a duty to protect a defendant's Constitutional Right to a fair Trial. "State V. White, 371 S.C 439,639 S.E. 2D 160 (2006).

In Response to Applicant's brief against why he feels the Conditional order of dismissal should not be granted. The Honorable Edgar W. Conditional stated that in the above- Referenced action and the Applicant's response stated that in the above- Referenced action and the Applicant's response there to dated April 1, 2013. The Applicant's objection to the final order of dismissal rest primarily on the Application of Marlar V. State, 357 S.C 407, 653 S.E 2d 266 (2007). While the court understands the Applicant's argument regarding the case reads it, the Marlar holding only Applies to the question of whether Allegations raised in a PCR action and Litigated therein but not addressed specifically by trial Court's ruling are preserved for Appeal Absent A Rule 59(E) motion. The Supreme Court therein held that they are not. The Marlar Case does not suggest , as the applicant Alleges, that a second PCR Application is the proper remedy for issues raised in a first application which were not expressly ruled upon in the trial courts order of dismissal. On the contrary, the case suggests that the only remedy there is a Rule59(E) Motion to alter or amend the Judgment.

Additionally, The South Carolina Rules of Civil Procedure state: "[A] Motion to Alter or Amend the Judgment shall be served not later than ten (10) days after receipt of written notice of entry of the order. "S.C.R. Civ.P. 59(E). To the courts knowledge, NO 59(E) Motion was ever filed by the Applicant upon receipt of the

court's order dismissing his initial PCR Application.

Therefore, because Applicant has filed a previous Application for Post-Conviction Relief and he Filed no Rule59(E) motion therein, the court finds that all assertions I n the Applicant second PCR Application are procedurally barred pursuant to Rule59(E) time Limitation or pursuant to S.C. Code Ann.§ 17-27-90.

In the Honorable Judge Edgar W. Dickson Ruling he stated that he understands the Applicant's argument regarding the case, but he disagrees with the case Applicant rest his Application on which was Marlar V. State, 375 S.C. 407, 653 S.E 2d 266 (2007).

However being that Applicant was a Layman with Limited Knowledge of the Law at that time, Application upon. But After receiving the Judge order. The Applicant in preparing for his Appeal of the Judge order has founded the proper Rules of procedure to base his case upon.

First Applicant would like for this court to understand that respondent as well as the PCR Judge is trying to hold Applicant responsible for Lawyer Negligence. When this should not be because the Law asserts that Applicant has a liberty interest in statutorily Appointed PCR Counsel, and therefore, his Rights were violated when PCR Counsel failed to ensure that all grounds for relief were included for review. Applicant was also denied a full and fair bite at the Apple when his Appointed Counsel Failed to ensure that all of his issues were address as well as ruled upon and specific finding were made concerning each issue.

Because of the fact that Applicant was appointed counsel pursuant to statutory law, Applicant's Counsel was required to provide effective assistance in compliance with the Sixth amendment of the United States Constitution.

Applicant would also like to show the court that the South Carolina Rules of Civil Procedure also stated that "Counsel preparing proposed orders should be meticulous in doing so, opposing Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omission to the attention of the PCR judge prior to the issuance of the order, and the PCR judge should carefully review the order prior to signing it. Moreover, after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRPC, motion to alter or amend if the order fails to set forth the findings as required by §17-27-80 and Rule 52(A), SCRPC "McCullough V. State, -S.C-, 464 S.E. 2D 340, 341 (1995).

Also, In McCoy V. State (opinion No. 27214, Feb 6, 2013), the S.C Supreme Court reversed and remanded for hearing the dismissal of the petitioner's PCR Application. The Supreme Court held that summary dismissal of the petitioner's second PCR application was error because genuine issues of material fact existed as to whether his claim was successive or barred by the statute of limitations.

When considering the State's Motion for summary dismissal, 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 V. State, 363 S.C. 432,434,611 S.E 2d 494,495 (2005) (Citing S.C Code Ann.§ 17-27-80)

Where and Applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against Successive PCR Applications and those facts are not conclusively refuted by the record before the PCR court, A question of fact is raised which can only be resolved by a hearing. CF. DeLaney V. State, 269 S.C. 555, 556, 238, S.E 2d 679, 679 (1977).

Conclusion

Wherefore after reviewing the statement of facts and issues Presented, and unique Combinations of inaction by both PCR Counsel and the PCR Judge, the instant Application presents sufficient questions of Law and fact warranting an evidentiary hearing in the instant matter. Sharper V. State, 305 S.E. 2D 247 (S.C.1983) also see, McCoy V. State (opinion No. 27214, Feb. 6, 2013)

Therefore, Petitioner respectfully prays the competent counsel be appointed and an Evidentiary hearing convened at the earliest Convenience.

Respectfully Submitted,

IS/ Russell Montgomery

Russell Montgomery

