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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

The Honorable Patrick Cleburne Fant III, Circuit Court Judge

Appellate Case No. 2024-000474

David D. Stalk……Appellant,

v.

The State of South Carolina ……Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the circuit court erred in finding David Stalk voluntarily waived his right to appeal the denial of his first post-conviction relief order of dismissal?

STATEMENT OF THE CASE

David Stalk was indicted by a Lancaster County Grand Jury for murder, attempted armed robbery, and possession of a deadly weapon during the commission of a violent crime in May 2013. The indictments came after the alleged armed robbery and death of Kelvisus Anthony in January 2013. Mr. Stalk intended to enter a guilty plea to manslaughter, but later changed his mind. He proceeded to a jury trial before the Honorable R. Knox McMahon on January 13-17, 2014, and was found guilty on all charges as indicted. Mr. Stalk was represented by Lancaster County Assistant Public Defender Mark Beard at trial. Judge McMahon sentenced him to concurrent terms of 45 years for murder, 20 years for attempted armed robbery, and five years for the weapons charge. Through counsel, Mr. Stalk timely filed a direct appeal, arguing the trial court erred in failing to suppress his confession because the statement was made following a promise of leniency, and threats or promises were made to his family. The Court of Appeals affirmed in an unpublished opinion pursuant to Rule 220(b), SCACR. *State v. Stalk*, 2016-UP-341 (S.C. Ct. App. filed June 29, 2016).

Mr. Stalk filed a *pro* se application for post-conviction relief (PCR) August 28, 2018. He later filed an amended PCR application May 26, 2020. He was not appointed counsel and did not retain counsel. On October 3, 2020, the State moved to summarily dismiss the application on the basis that there was no genuine issue of material fact to necessitate an evidentiary hearing. On

October 9, 2020, the Court issued a Conditional Order of Dismissal. The application was dismissed with prejudice by an Order dated January 22, 2021 filed by the Honorable Eugene Griffith Jr.

Mr. Stalk filed a second PCR application on January 6, 2023, and an evidentiary hearing was held February 21, 2024, before the Honorable Patrick Cleburne Fant III. This second PCR application was dismissed with prejudice on March 22, 2024, and a notice of appeal was filed with the South Carolina Supreme Court.

ARGUMENT

Did the circuit court err in finding Stalk voluntarily waived his right to appeal the denial of his first post-conviction relief order of dismissal?

Judge Fant committed multiple errors of law when he concluded David Stalk voluntarily waived his right to appeal the denial of his first PCR proceeding (when the circuit court entered a final order of dismissal after the Attorney General's Office argued Stalk had missed the statute of limitations). To be clear, David Stalk is serving a 45-year sentence of incarceration in SCDC after conviction from his trial and he has not been allowed his right to pursue post-conviction relief at all up to this point.

"This Court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (quoting *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). "Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law." *Id.* (quoting *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

The circuit court's order of dismissal leaves out the most salient fact about this case—that David Stalk has been diagnosed with severe learning disabilities. As undersigned counsel pointed out to the court during the hearing on whether Stalk would be allowed appellate review of the initial dismissal of his PCR, he has been diagnosed with two learning disabilities—a reading learning disability and a mathematics learning disability.[1] The judge's order does not even mention "learning disability"—an astounding omission given the nature of Stalk's claim.

The circuit court's order is so rife with misunderstandings about the nature of Stalk's condition that, frankly, it is difficult to identify them all. But, in pertinent part, the circuit court made the following significant errors.

First, the circuit court found Stalk's educational and psychological reports to lack probative value because they occurred too long ago. App. 683-84. This fundamentally misapprehends the nature of learning disabilities which do not go away.[2] The judge's complete disregard of these documents provided by Stalk to the court, based on his mistaken belief they lack probative value, is wrong as a matter of law and provides a basis for this Court to reverse his decision. *See also State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713 (2017) (acknowledging educational and psychological records have probative value); *State v. Sparkman*, 287 S.C. 489, 339 S.E. 2d 865 (1986) (same); *Kershaw County Dept. of Social Services v. McCaskill*, 276 S.C. 360, 278 S.E.2d 771 (1981) (same).

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[1] At a bench conference, the Attorney General's Office argued that the Court should order that Stalk submit to another IQ test *at his own expense*. This is what counsel objected to as the family is far from wealthy and Stalk is, of course, indigent. Also, it was unnecessary in light of Stalk's diagnoses of learning disabilities, which unlike IQ scores, are not variable. App. 682.

[2] According to the US Department of Health and Human Services, National Institutes of Health, https://www.nichd.nih.gov/health/topics/learning/conditioninfo (*last visited* 10/20/2024).

The circuit court also found that Applicant argued he has a "permanent intellectual disability." App. 685. That is not accurate. Counsel argued, because it is true, that Stalk has a permanent learning disability.

The circuit court found it relevant that "nowhere does the [psycho-educational] report conclusively state Applicant had permanent and fixed cognitive deficits." App. 685. Why would it? That was not the purpose of the psycho-educational assessment. This remark evinces an astounding unfamiliarity with educational and psychological testing in addition to imposing an unrealistic burden on Stalk to prove his limitations to the satisfaction of Judge Fant such that Judge Fant has concluded that David Stalk voluntarily waived his right to the statutorily guaranteed right to challenge the order of dismissal in his case.

The circuit court also found that since Stalk received a 90% in language arts, App. 685, that this fact somehow undermines his claim of cognitive impairment but ignores the fact that score was earned in a special educational setting after he was removed from mainline public education.

The circuit court treated Stalk's claim during his sentencing that he graduated from 10th grade as somehow being more probative than what the psychological and educational records clearly demonstrate which is that he did not graduate 10th grade.

The circuit court also appeared to have conducted its own educational and psychological assessment by interpreting Stalk's "legible, well-written letters" to the Lancaster Clerk of Court without any inquiry at all about whether those letters were written on his behalf by other inmates as is often done in the prison milieu. If the court intended to rely on that evidence to support its finding that Stalk does not have cognitive limitations, it should have given the parties an opportunity to respond to it. App. 686.

Judge Fant's conclusion that counsel has "offer[ed] pure conjecture," App. 686, as to Stalk's current cognitive limitations is wildly inaccurate, and the court's order frankly reeks of insensitivity bordering on discrimination. Simply because the circuit court has decided that educational records lack probative value, it does not follow that counsel has offered mere "pure conjecture" about the issue.

Throughout his order, Judge Fant refers to the "alleged psychological report conducted by David G. Yarborough, III", App. 684, and "the uncertified public-school records," App. 684, as though those documents were falsified and nefariously presented to the court in this matter. Nothing could be further from the truth and the circuit court's skepticism about the veracity of the records has absolutely no basis in fact. *See State v. Green*, 427 S.C. 223, 830 S.E.2d 711 (Ct. App. 2017) (the standard for authentication is not high).

The circuit court further noted that Stalk received a 90 in Language Arts during the 2002-2003 and claims he was "making progress" and that this fact "does not support a conclusive finding Applicant is presently cognitively impaired to such an extent he was not able to progress past a second/third-grade reading level in the past twenty-two years." App. 685. Aside from being an inaccurate characterization of the record (see next paragraph), Judge Fant applies the wrong standard of proof for this matter. The question before him was merely whether Stalk knowingly and voluntarily waived his right to an appeal, not whether he has "conclusively" shown cognitive impairment over the past 22 years. This finding is not entitled to any deference by this Court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

But, additionally, the circuit court cherry-picked facts and has mischaracterized the documents presented. As for the circuit court's finding that Stalk was "making progress," that

statement unambiguously referred to Stalk's behavior, not his academic achievement ("He had made great improvements in his behavior… His Grandfather has been involved in conferences and has stated he stays home more and has also improved there as well."). App. 642. But here is what else the court disregarded:

- The 2002 document indicates Stalk was tested by Special Services and an IEP had been developed. App. 642.
- He was placed in resource classes in math and reading.
- That Eastside Academy, where Stalk attended 9th grade, "is a program structured for students with severe behavioral and adaptive deficits in the regular school environment." App. 653.
- "His skill deficits remain." App. 653
- He was determined to have Borderline intellectual functioning. App. 654.
- In 9th grade, he was reading at a low second-grade level which was found to be "considerably below average." App. 655.
- Dr. Yarborough concluded:
  Based on the results of this psycho-educational evaluation, David is functioning in the borderline significantly/ severely below average range of academic aptitude and in the significantly below average range of academic achievement. David has a **severe deficit in basic reading comprehension and math reasoning,** according to SC Redbook guidelines. He is eligible for support as a resource student in these areas (emphasis in original). App. 657.

The circuit court also found probative Stalk's claim that he completed 10th grade and that his representations to the court show that he should have been able to comprehend the PCR court's instructions in the Final Order of Dismissal. App. 685-86.

The circuit court committed substantial errors of law while focusing its inquiry into whether David Stalk has intellectual or learning disabilities and not on whether he knowingly and voluntarily waived his right to challenge the order of dismissal in his case that was issued when he

was without counsel. While there is some overlap, the questions are distinct. The circuit court had one issue before it—whether Stalk knowingly and voluntarily waived his right to challenge the order. In response, Stalk showed the court he had hired counsel to pursue this issue. He submitted a letter to the circuit court illustrating that he intended to exercise his statutory right to a PCR proceeding. He presented a Flesch-Kincaid assessment of the letter sent to him informing him of his right to file a PCR after he lost his direct appeal. App. 631. Instead of addressing that issue, the court called the parties to a sidebar where the argument centered on whether Judge Fant was going to order Stalk to submit to a psychological test to assess his IQ at his own expense, as requested by the Attorney General's Office.

Respectfully, this Court should reverse Judge Fant's order denying Stalk the right to appeal the denial of his first order of dismissal which occurred when Stalk was not represented by counsel. David Stalk merely asks for the ability to appeal the denial of his first order of dismissal that was filed when he did not have counsel.

CONCLUSION

This Court should reject Judge Fant's conclusion that David Stalk knowingly and voluntarily waived his right to appeal the order of dismissal from his first attempt at receiving a post-conviction relief proceeding.

Respectfully submitted,

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