

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Berkeley County

Honorable Walton J. McLeod, IV, Circuit Court Judge

NATALIA CHISOLM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2024-000793

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the circuit court erred by dismissing Petitioner's PCR action for failure to comply with the statute of limitations, where circumstances preventing Petitioner from making a timely filing were both beyond her control and unavoidable despite due diligence, since equitably tolling the statute of limitations was warranted?

STATEMENT

Procedural history

On June 23, 2015, a Berkeley County Grand Jury indicted Natalia Chisolm, Petitioner, for first-degree burglary, armed robbery, and kidnapping. App. 79 – 84. On June 30, 2016, Petitioner appeared before the Honorable J. Mark Hayes for a guilty plea hearing. Melisa Gay represented Petitioner. Elizabeth Sigal prosecuted the case. App. 1. The court sentenced Petitioner to serve concurrent terms of imprisonment of twenty years for each offense.¹ App. 29, ll. 16-18; App. 85 – 87.

Petitioner directly appealed her convictions, and on December 8, 2016, the Court of Appeals dismissed the appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR. The remittitur was issued on December 30, 2016. On September 22, 2020, Petitioner filed an application for post-conviction relief (PCR). App. 31 – 37. Petitioner simultaneously filed a memorandum in support of her request for an evidentiary hearing. App 38 – 44. On October 25, 2023, the State made its return and motion to dismiss. App. 42 – 47. On October 31, 2023, Petitioner made her return to the State’s motion to dismiss. App. 48 – 50.

On March 12, 2024, a hearing was held before the Honorable Walton J. McLeod, IV, on the State’s motion to dismiss. The hearing was to determine whether Petitioner should be barred from seeking post-conviction relief due to the statute of limitations or whether the statute of limitations should be equitably tolled so that she could receive a hearing on the merits. Petitioner was represented by Tommy Thomas. Danielle Dixon represented the State. App. 51;

¹ Although the plea was presented as a “straight up” guilty plea, the State dismissed by nolle prosequi second-degree burglary, two counts of armed robbery, two counts of kidnapping, two counts of contributing to the delinquency of a minor, unlawful carrying of a pistol, and possession of a weapon during the commission of a violent crime. App. 8, ll. 13-24; App. 74 – 75.

App. 54, l. 3 – 56, l. 23. On April 26, 2024, the circuit court issued an order of dismissal. App. 74 – 78.

Relevant facts

At the hearing on the State’s motion to dismiss, Petitioner established the following. On December 1, 2016, Petitioner sent a letter to the Court of Appeals asking for the status of her direct appeal. App. 70 – 71. On May 8, 2018, Petitioner sent a letter to this Court requesting the status of her direct appeal. Petitioner wrote at the bottom of the letter: “I’m trying to put in for my PCR I can’t do anything till my appeal is answered wether [sic] is denied or granted I know it takes time, I just want to find out it’s status? Please”. App. 72. On June 1, 2018, the Court of Appeals sent Petitioner a letter which stated that her appeal was dismissed on December 8, 2016, and the remittitur was issued on December 30, 2016. App. 73. The letters were made Plaintiff’s Exhibits at the hearing on the motion to dismiss. App. 70 – 73.

Petitioner testified she never heard anything from plea counsel about the status of her direct appeal. App. 58, ll. 7-12. Petitioner stated plea counsel did not advise her regarding the statute of limitations for PCR. App. 63, ll. 22-25; App. 65, ll. 8-12. Petitioner confirmed she wrote to the Court of Appeals and to this Court asking the status of her appeal. App. 59, ll. 6-8. Petitioner stated she also contacted the Berkeley County Clerk of Court’s Office. App. 58, ll. 13-17. Petitioner learned in 2018 that her direct appeal was final. She filed a PCR application on September 22, 2020. App. 64, ll. 11-18.

Petitioner stated she thought she could only file “one legal thing at a time.” App. 58, ll. 21-24. Petitioner said she was “waiting on the answer from my appeal in order for me to file for my PCR.” App. 58, ll. 18-19. Petitioner stated she did not learn her appeal was dismissed until two years after the fact. Petitioner thought therefore that she could no longer file a PCR

application—she thought she had already missed her chance. “As soon as I found out about my . . . appeal being denied or dismissed. It was two years later, two years and some change. It was maybe two years and some change, and I did not know that I could file for my PCR at that time.” App. 62, ll. 18-21. Petitioner stated that after a few years she was able to get some money together and contacted PCR counsel to see if there were any other legal avenues of relief. At that point, PCR counsel advised her to file for PCR “since I wasn’t at fault and nobody had contacted me to let me know my appeal had been dismissed or denied.” App. 62, l. 22 – 63, l. 8. “I thought my PCR was over, so I was going to try for something else. [PCR counsel was] the one that told me I could still try for my PCR.” App. 65, ll. 3-5.

The State argued that the PCR application was not timely, and that Petitioner did not act diligently once she learned her appeal had been dismissed. “That was the time to begin acting, and she didn’t do that[.]” App. 66, ll. 18-19; App. 67, ll. 3-5. PCR counsel argued that Petitioner had not received her one bite at the apple and that equitable tolling should apply. “[W]hen she finally found out that her appeal had been denied she thought she was completely out of time.” App. 67, ll. 9-25; App. 56, ll. 9-23.

In its order of dismissal, the circuit court concluded the “action should be dismissed for failure to comply with the statute of limitations.” App. 75. The order stated: “The remittitur was sent December 30, 2016. This PCR application was filed September 22, 2020—almost four years after the filing period expired.”² App. 76. “This Court further finds the statute of limitations should not be equitably tolled.” App. 76. “Even if the statute was tolled until the time Applicant learned her direct appeal had been dismissed, Applicant acknowledged she

² One year from December 2016 was December 2017. This application was filed in September 2020, which was approximately two years and nine months after that.

learned her direct appeal had been dismissed, Applicant acknowledged she learned about the dismissal of that appeal when the Court of Appeals notified her of its dismissal in its June 1, 2018 letter.” App. 77 (footnote omitted). “Notwithstanding this, Applicant waited until September 2[2], 2020, to file the current application. To the extent Applicant claims she did not file the application sooner because she believed the statute of limitations had expired, this Court finds that is not a valid basis for setting aside the statute of limitations.” App. 77. “*See Leamon*, 363 S.C. at 435, 611 S.E.2d 496 (‘Ignorance of the statute of limitations is not an excuse for late filing . . .’).”³

The order continued, “Applicant has not established that (1) extraordinary circumstances prevented her from filing despite due diligence, (2) she actively pursued judicial remedies by filing a defective pleading during the statutory period or was induced or tricked by Respondent’s misconduct into allowing the statutory deadline to pass, or (3) despite all due diligence, she was unable to obtain vital information bearing on the existence of her claim. *Pelzer*, 378 S.C. at 521, 662 S.E.2d at 619-20.”⁴ App. 77 – 78.

This petition for writ of certiorari follows.

³ *Leamon v. State*, 363 S.C. 432, 435, 611 S.E.2d 494, 496 (2005).

⁴ *Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 619-20 (Ct. App. 2008).

ARGUMENT

The circuit court erred by dismissing Petitioner’s PCR action for failure to comply with the statute of limitations, where circumstances preventing Petitioner from making a timely filing were both beyond her control and unavoidable despite due diligence, since equitably tolling the statute of limitations was warranted.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). Claims of ineffective assistance of counsel are governed by the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10 – 17-27-160. “All applicants are entitled to a full and fair opportunity to present claims in one PCR application.” *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999).

There is a one-year statute of limitations to initiate a PCR action. S.C. Code Ann. § 17-27-45(A) provides that an application for PCR “must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.” An “application is deemed ‘filed’ when it is delivered to and received by the Clerk of Court.” *Mose v. State*, 420 S.C. 500, 507, 803 S.E.2d 718, 721 (2017).

However, “where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.” *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (cleaned up). “Equitable tolling may be applied where it is justified under all the circumstances.” *Id.*, 386 S.C. at 117, 687 S.E.2d at 33.

“[T]he unique conditions of incarceration require a holding that the statute of limitations should be tolled if the circumstances warrant.” *Mose*, 420 S.C. at 510, 803 S.E.2d at 722. Equitable tolling may apply to the statute of limitations to file a PCR action where “circumstances preventing a petitioner from making a timely filing were both beyond the petitioner’s control and unavoidable despite due diligence.” *Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009) (quoting *Com. v. Carneal*, 274 S.W.2d 420 (Ky. 2008)). “Tolling the statute of limitations in circumstances in which an applicant demonstrates the failure to timely file for PCR was due to no fault of his own does not create an exception by which incarcerated litigants may avoid time restrictions. Instead, it provides PCR applicants with functionally equivalent time bars and seeks to ensure equal access to the courts for all.” *Mose*, 420 S.C. at 510, 803 S.E.2d at 723 (cleaned up).

Equitable tolling has been deemed available where (1) extraordinary circumstances prevented the plaintiff from filing despite his or her diligence; (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant’s misconduct into allowing the filing deadline to pass; or (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim. *Pelzer v. State*, 378 S.C. at 521, 662 S.E.2d at 620–21. In its order of dismissal, the circuit court cited *Pelzer* in support of its decision. However, an application of *Pelzer* supports equitable tolling in this case. Petitioner met both (1) and (3) here. She established that extraordinary circumstances prevented her from filing despite her due diligence. She also established that despite all due diligence, she was unable to obtain vital information bearing on the existence of her claim—the disposition of her direct appeal. It was undisputed that Petitioner wrote to the appellate courts in 2016 and in 2018

to ascertain the status of her direct appeal. Petitioner testified she also tried contacting the Berkeley County Clerk of Court's Office. App. 58, ll. 13-17. She did not receive a response in 2016. She did not learn her direct appeal was final until 2018. On May 8, 2018, Petitioner sent a letter to this Court: "*I'm trying to put in for my PCR I can't do anything till my appeal is answered wether [sic] is denied or granted I know it takes time, I just want to find out its status? Please*". App. 72 (emphasis added). On June 1, 2018, the Court of Appeals sent Petitioner a letter which stated that her appeal was dismissed on December 8, 2016, and the remittitur was issued on December 30, 2016. App. 73. At that point, more than a year had passed since her direct appeal became final. Petitioner testified she thought this meant she had already missed her chance. "As soon as I found out about my . . . appeal being denied or dismissed . . . It was maybe two years and some change, and I did not know that I could file for my PCR at that time." App. 62, ll. 18-21. Petitioner stated that after a few years she was able to get some money together and she contacted PCR counsel to see if there were any other legal avenues of relief. Once PCR counsel advised her it might still be possible to obtain post-conviction relief, she filed a PCR application. App. 62, l. 22 – 63, l. 8; App. 65, ll. 3-5. Because Petitioner, "despite all due diligence, [wa]s unable to obtain vital information bearing on the existence of his or her claim," or alternatively, because "extraordinary circumstances prevented her from filing," the circuit court should have applied equitable tolling. *Pelzer v. State*, 378 S.C. at 521, 662 S.E.2d at 620–21.

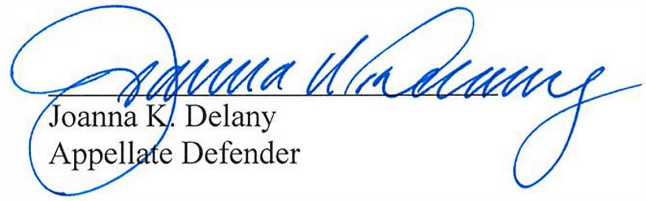
The circuit court also cited *Leamon v. State*, 363 S.C. 432, 435, 611 S.E.2d 494, 496 (2005) in support of its decision. *Leamon* explained that: "Ignorance of the statute of limitations is not an excuse for late filing, even when the Petitioner claims he did not learn of the statute because he was incarcerated in another state." *Id.* In this case, Petitioner does not rely on

ignorance of the statute of limitations. She believed the statute of limitations had already run because more than one year had passed since, despite due diligence, she did not learn her direct appeal was final until more than a year after the remittitur was issued. “Equity aids the vigilant, not those who slumber on their rights.” *E.g., Eldridge v. Eldridge*, 398 S.C. 113, 121, 728 S.E.2d 24, 28 (2012). Petitioner did not miss the statutory deadline because she was sleeping on her rights. *Leamon* should not bar relief.

Circumstances preventing Petitioner from making a timely filing were both beyond her control and unavoidable despite due diligence. *Ferguson*, 382 S.C. at 618, 677 S.E.2d at 602. Equitable tolling was “justified under all the circumstances” here. *E.g., Hooper*, 386 S.C. at 117, 687 S.E.2d at 33.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.



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ATTORNEY FOR PETITIONER

This 19th day of February, 2025.