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NOV 01 2013

S.C. SUPREME COURT

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October 29, 2013

The Honorable Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: James Robert Byrd, SCDC # 98230 vs. The State of South Carolina
Case No: 2011-CP-23-7846

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and a Proof of Service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

Rodney Richey

RWR/tlg
enclosures
cc: Karen Ratigan, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2011-CP-23-7846

JAMES R BYRD, SCDC#: 98230,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.


RECEIVED

NOV 01 2013

S.C. SUPREME COURT

NOTICE OF APPEAL

James Byrd appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Robin B Stilwell, Circuit Judge on August 28, 2013 and Order issued on October 22, 2013 and filed on October 23, 2013. The Appellant received notice of the judgment on October 29, 2013.



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Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2011-CP-23-7846

JAMES R BYRD, SCDC#: 98230,

against

STATE OF SOUTH CAROLINA,


RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on October 30, 2013, addressed to their attorney of record, Karen Ratigan, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: October 30, 2013

RICHEY & RICHEY, P.A.



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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2011CP2307846

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 OCT 24 AM 8 48

James R Byrd 98230 vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:
Dated at Greenville, South Carolina, this 24th day of October, 2013.

Court Reporter:

PRESIDING JUDGE - Robin B Stilwell

This judgment was entered on the 24th day of October, 2013, and a copy mailed first class this 24th day of October, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

✓ Rodney Wade Richey PO Box 10916 Greenville, SC 296030916

Karen Christine Ratigan PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
James Robert Byrd,)
S.C.D.C. No. 98230,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
C.A. No. 2011-CP-23-7846

ORDER OF DISMISSAL

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2013 OCT 24 AM 8 48

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed November 22, 2011. The Respondent made its return on March 29, 2012. An evidentiary hearing into the matter was convened on August 28, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Rodney W. Richey, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying were Parole Agent Allen Norfus, Sr., former Parole Agent Tony Anderson, and Administrative Hearing Officer Fredna Gary. The Court had before it the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, the prior PCR and appellate records, and South Carolina Department of Probation, Parole and Pardon Services (SCDPPPS) records relating to the Applicant's parole revocation.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections.

RA'S

The Applicant was indicted at the April 1981 term of the Greenville County Grand Jury for kidnapping (1981-GS-23-1642) and first-degree criminal sexual conduct (CSC) (1982-GS-23-1643). The Applicant was represented by H.W. "Pat" Paschal, Jr., Esquire.

After the State brought the case to trial, the Applicant was found guilty. On July 28, 1981, the Honorable James B. Stephen sentenced the Applicant to concurrent terms of life imprisonment for kidnapping and thirty years for first-degree CSC.

Direct Appeal

A notice of appeal was filed at the South Carolina Supreme Court. John L. Sweeney, Esquire and William I. Diggs, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Supreme Court affirmed the Applicant's conviction and sentence. State v. Byrd, Op. No. 82-MO-382 (S.C. Sup. Ct. filed Dec. 29, 1982).

Post-Conviction Relief

1983

The Applicant filed a PCR application on January 19, 1983. The Applicant raised the following issues:

1. Ineffective assistance of trial counsel.
2. Ineffective assistance of appellate counsel.
3. Unconstitutional search.
4. Unconstitutional indictment.
5. Unconstitutional statute.
6. Double jeopardy.

An evidentiary hearing was convened on May 17, 1983. Phillip E. Reeves, Esquire represented the Applicant. The Honorable Francis B. Nicholson denied and dismissed the PCR application by order dated June 27, 1983. The Applicant filed a timely notice of appeal at the South Carolina Supreme Court, which was perfected by Tara Shurling, Esquire of the South

Carolina Office of Appellate Defense. On January 9, 1984, the Supreme Court denied the petition for writ of certiorari.

1986-CP-23-0278

The Applicant filed a PCR application on January 6, 1986 (1986-CP-23-0278). The Applicant raised the following issues:

1. Ineffective assistance of counsel.
2. "Trial judge failed to advise jury mercy could be recommended."
3. "Trial judge made false statement in his charge to jury."

The Respondent filed a return and motion to dismiss. In an order dated September 4, 1986, the Honorable C. Victor Pyle, Jr. dismissed the application because it was successive. The Applicant did not appeal.

1996-CP-23-0471

The Applicant filed a PCR application on February 14, 1996 (1996-CP-23-0471). The Applicant raised the following issues:

1. "Parole question regarding life sentence for kidnapping."
2. "Change in State law."
3. "Violation of Applicant constitution right to due process."

The Respondent filed a return and motion to dismiss. The Honorable C. Victor Pyle, Jr. issued a conditional order of dismissal dated June 26, 1996. Judge Pyle issued a final order of dismissal dated August 16, 1996. The Applicant filed a timely notice of appeal at the South Carolina Supreme Court, which was perfected by Wanda H. Haile, Esquire of the South Carolina Office of Appellate Defense. On December 8, 1997, the Supreme Court denied the petition for writ of certiorari.

1998-CP-23-1302

The Applicant filed a PCR application on April 14, 1998 (1998-CP-23-1302). The Applicant raised the following issue:

1. "Denial of due process of law where Applicant was convicted at a standard of less than required by the due process clause as a result of erroneous jury instructions on the term 'reasonable doubt;' and counsel was rendered ineffective through change in common law making and recognizing the jury instructions as erroneous and a structural defect."

An evidentiary hearing was convened on August 3, 1999 at the Greenville County Courthouse. James F. Brehm, Esquire represented the Applicant. The Honorable John W. Kittredge denied and dismissed the PCR application by order dated September 17, 1999. The Applicant filed a timely notice of appeal at the South Carolina Supreme Court, which was perfected by Wanda H. Haile, Esquire of the South Carolina Office of Appellate Defense. The Supreme Court denied the petition for writ of certiorari and the remittitur was sent on December 4, 2001.

Federal Habeas Corpus

The Applicant filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina on January 10, 2002 (3:02-0060-12BC). The Respondent submitted a motion for summary judgment on May 1, 2002. The Honorable Joseph R. McCrorey, United States Magistrate Judge, issued a report and recommendation to grant the motion for summary judgment dated January 10, 2003. On March 17, 2004, the Honorable C. Weston Houck, United States District Judge, issued an order granting the motion for summary judgment and dismissing the petition with prejudice.

Parole Revocation

On November 26, 2003, the Applicant was paroled by the South Carolina Board of Probation, Pardon and Parole Services (the Parole Board).

On May 11, 2011, an arrest warrant was issued to the Applicant for the following violations:

By violating conditons [sic] 3 and 10 of his Conditions of Supervision dated 11-21-03 and 10 of the Standard Sex Offender Conditions dated 1-30-06 by the South Carolina Board of Probation, Parole, and Pardon Services and continuation orders by the Administrative Hearing Officer dated 3/28/06, 10/3/06, 3/18/08, 6/4/09, and 3/14/11.

(Parole Arrest Warrant number W-23-11-0384). The return on the warrant indicates it was served upon the Applicant on May 12, 2011. A more detailed Violation Report was issued on July 12, 2011.

On August 2, 2011, the Applicant attended an administrative hearing. The hearing officer issued an Administrative Hearing Summary in which: (1) it was found the Applicant violated conditions 3 and 10 in the Certificate of Parole accepted by the Applicant upon his release and (2) parole revocation was recommended. On September 14, 2011, the Applicant appeared at a parole violation hearing held before a three (3) member panel of the Parole Board, pursuant to which his parole was revoked.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Violation of Fourth and Fourteenth Amendments:
 - a. Violation of due process.
 - b. Violation of equal protection.
 - c. Violation of presumption of innocence because the parole violation

- was based on charges that were still pending.
- d. The administrative hearing officer should not have allowed the statement of a deputy sheriff to be “enter in as evidence when such admission constituted a violation of Applicant created right granted by the Responding.”
 - e. Parole agent “willfully withheld a statement from Miss Lelia D. Banks that completely exonerate Applicant from any and all wrong doing.”
2. Violation of constitutional right to bail.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe the witness who testified at the hearing, and to closely pass upon his credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A proceeding under the Uniform Post-Conviction Procedure Act may be instituted by: “Any person who has been convicted of, or sentenced for, a crime and who claims . . . [t]hat his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint.” S.C. Code Ann. § 17-27-20 (Supp. 2004). An inmate’s non-collateral claim that his parole was unlawfully revoked falls squarely within the ambit of the PCR statute. Kerr v. State, 345 S.C. 183, 547 S.E.2d 494 (2001); Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). However, this does not give the court the authority either to conduct a de novo review of the case or to otherwise sit in an appellate capacity to review the Parole Board’s discretionary decision. To the contrary, the South Carolina Code specifically provides: “[t]he board shall be the sole judge as to whether or not a parole has been violated and no appeal therefrom shall be allowed.” S.C. Code Ann. § 24-21-680 (1989 &

Supp. 2004). The court's review of whether the Applicant's parole was unlawfully revoked is limited to an examination of whether the revocation procedure itself was lawful.

The Applicant stated his parole was improperly violated based on a pending criminal domestic violence (CDV) charge and that he was later found not guilty of this charge. The Applicant stated he had not been drinking alcohol when he was arrested for CDV. The Applicant stated SCDPPPS should have waited to begin revocation proceedings until after the CDV charge went to court. The Applicant admitted, however, that he had five prior parole violations.

Parole Agent Allen Norfus, Sr. testified that, while he was not the Applicant's agent, he conducted the administrative hearing. Agent Norfus testified the Applicant was arrested for CDV and the incident report indicated he had been drinking alcohol. Agent Norfus testified he reviewed the incident report and spoke to the victim and determined there was probable cause to issue a parole arrest warrant. Agent Norfus testified the Applicant was not allowed to drink alcohol (because he was a Sex Offender) and that this violated his parole. Agent Norfus testified he presented the incident report and the violation report at the administrative hearing.

The Applicant's former Parole Agent, Tony Anderson, testified he was not present at the administrative hearing but that he presented the case to the Parole Board. Anderson testified he compiled the list of allegations against the Applicant. Anderson testified the Applicant violated his parole by (1) drinking alcohol and (2) not reporting that he had been arrested for CDV. Anderson testified the Applicant had five prior parole violations that were considered when the present parole violation was issued.

SCDPPPS Administrative Hearing Officer Fredna Gary testified she remembered the

Applicant's case. Hearing Officer Gary testified she issued a report from the hearing and that such report is not signed because it is usually sent by email to the offender's supervising parole agent. Hearing Officer Gary testified she found there was probable cause the Applicant violated his parole. Hearing Officer Gary testified the incident report from the CDV arrest indicated both the Applicant and the victim were intoxicated (and there were beer cans throughout the room) and that the victim's lip was bleeding and there was blood on the wall. Hearing Officer Gary testified the Applicant had five prior parole violations (two of which involved new charges) and that she takes the prior violations into account. Hearing Officer Gary testified she found probable cause in this case.

This Court finds the Applicant has failed to meet his burden of proving his due process rights were violated and his parole unlawfully revoked. This Court finds the Applicant was arrested for CDV and the arresting officer noted the Applicant's intoxication on the incident report. This Court finds the Applicant's use of alcohol and the failure to report the arrest were the basis for the Applicant's parole arrest warrant. This Court notes parole is a matter of grace, not a right. See Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593 (1972). As noted supra, the Applicant clearly violated the terms of his parole. Hearing Officer Gary did not find the Applicant committed the offense. Rather, she found the parole arrest warrant was issued based on probable cause and also considered the Applicant's five prior parole violations in reaching this conclusion. The Applicant's case was properly before the Parole Board and this Court finds the Parole Board's revocation procedure in this case was lawful. This Court concludes the Applicant is not entitled to a new parole revocation hearing.

This Court concludes the Applicant has not met his burden of proving he is entitled to

post-conviction relief. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

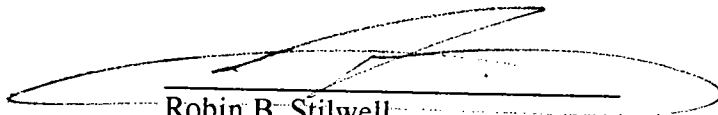
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations related to the parole revocation proceedings. Therefore, this PCR application is denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 22 day of OCT, 2013.



Robin B. Stilwell
Presiding Judge
Thirteenth Judicial Circuit

G'VILLE, South Carolina.

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The Honorable Daniel E. Shearouse
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