

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

NOV 26 2013

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

George C. James, Jr., Circuit Court Judge

Case No. 2012-CP-45-547

Jamel L. Alexandrette, # 321631 Appellant,

vs.

State of South Carolina Respondent.

RULE 243(c), SCACR EXPLANATION

JAMEL L. ALEXANDRETTE
#321631
Lieber Correctional Institution SA-49
Post Office Box 205
Ridgeville, South Carolina 29472-0205

APPELLANT, Pro se

This matter is before this Honorable Court by way of a Notice of Appeal from the October 25, 2013 order of denial of an application for post-conviction relief by the Honorable George C. James, Jr., from Williamsburg County. As the order of denial was a summary dismissal based on statute of limitations and successive application, this Explanation is filed with the Notice of Appeal, pursuant to Rule 243(c), SCACR, despite such specificity in the order of denial.

PROCEDURAL HISTORY

The Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Appellant was indicted during the October 2006 term of the Williamsburg County Grand Jury for Murder. He was represented by Legrand Carraway, Esq.. On May 1, 2007, Appellant pled guilty to the charge and the Honorable R. Ferrell Cothran, Jr. sentenced Appellant to thirty (30) years. No appeal was taken.

Appellant filed a timely post-conviction relief ("PCR") application (2008-CP-45-0095). Appellant was represented by Charles T. Brooks, III, Esq. An evidentiary hearing was conducted on October 26, 2010 at the Sumter County Courthouse. The Honorable W. Jeffery Young denied and dismissed the application with prejudice in an order filed February 3, 2011.

A timely notice of appeal was filed. In a written order dated September 9, 2012, the South Carolina Supreme Court denied the petition for writ of certiorari. The Remittitur was issued on September 26, 2012.

Appellant the instant PCR on October 5, 2012. He filed an amended PCR application an March 21, 2013.

Appellant filed a timely Petition for Writ of Habeas Corpus (No. 12-3304-DCN-BHH) in the United States District Court. In an order dated 8/2/13 the United States Magistrate placed the federal petition in abeyance pending the exhaustion of the instant PCR in state court that those issues may be properly included in the federal petition.

The Honorable George C. James, Jr. signed the conditional Order of Dismissal dated June 10, 2013. Appellant was not served a copy of the Order until September 25, 2013. Appellant filed an Opposition to the Conditional Order and proposed order on October 2, 2013. The PCR Court signed the final order on October 25, 2013.

EXPLANATION

A. This Application is not barred by the Statute of Limitations.

The PCR Court found that this PCR should be summarily dismissed for failure to comply with the filing procedures – the statute of limitations set forth in S.C. Code § 17-27-45(a). (Order, pg. 5).

Appellant contends that the PCR Court was in error where the records before that Court clearly established that this PCR application was filed within the one year statute of limitations of § 17-27-45 (a).

Appellant pled guilty on May 1, 2007. He filed the first PCR (2008-CP-45-0095) on 2/26/08 [301 days]. That left 64 days remaining on the one year from May 1, 2007 and in which to file a federal writ of habeas corpus. Following dismissal of the PCR and issuing of the Remittitur following the denial of the petition for writ of certiorari dated September 26, 2012. Appellant filed the instant PCR on October 5, 2012; (within 10 days). Appellant had 54 days remaining before the expiration of the one-year statute of limitations.

Appellant's current PCR was timely within § 17-27-45 (a), thus the PCR Court's finding that the statute of limitations lapsed was in error.

B. This Application presents "sufficient reasons" and unique facts to overcome successive bar.

The PCR Court found that this PCR should be summarily dismissed for being successive. S.C. Code Ann. §17-27-90. (Order, pg. 4-5).

The Appellant contends that this PCR presents unique facts which, if true, overcome the bar to successive applications, and in the interest of justice, the Appellant is entitled to the relief prayed for.

Generally, a PCR Applicant is allowed only one chance to have his PCR claims heard. However, under the very Code the PCR Court relied on, in part, to support summary dismissal as a successive application, the Appellant also relies in part:

"... May not be the basis for a subsequent application, *unless* the court finds a ground for relief asserted which for *sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application*

S.C. Code Ann. § 17-27-90 (emphasis supplied).

A "sufficient reason" under § 17-27-90 has been interpreted as requiring a showing that a ground could not have been raised in the first PCR application. *Tilley v. State*, 334 S.C. 24, 511 Se 2d 689 (1999).

In *Washington v. State*, 324 S.C. 232, 478 S.E. 2d 833 (1996) the Court applied the standard established in *Aice v. State*, 305 S.C. 448, 409 S.E. 392 (1991). The *Washington* Court noted that the sole issue in *Aice* involved whether a convict may maintain a successive application for PCR on the ground that his first complete PCR application was sufficient due to ineffective PCR counsel. The *Washington* Court further emphasized:

At some juncture judicial review must stop, with *only the rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice.*

Washington v. State, 324 S.C. at 237, 478 at 835.

The Court concluded that since so many irregularities occurred during the course of *Washington's* judicial process, he was deprived of due process of law. Consequently, *Washington's* successive PCR application was granted. *Washington*, 324 S.C. 232.

While not absolutely barred, successive petitions are not favored unless Appellant meets burden of showing ample reason to permit him to litigate again. *Land v. State*, 274 S.C. 243, 262 S.E. 2d 735 (1980). Thus, the interest of justice may require the court to review successive applications based on unique facts. *Case v. State*, 275 S.C. 615, 274 S.E. 2d 415 (1981).

Appellant bears the burden of establishing "sufficient reason" and "unique facts" as to why the issues were not raised previously; why they were raised inadequately; and why they should be heard in this successive petition.

i. Trial counsel's failure to quash a defective indictment that deprived the court of jurisdiction was ineffective assistance of counsel and PCR counsel failed to raise and present the issue adequately.

The threshold matter is that Appellant's indictment for Murder (2006-GS-45-278) was "true-billed" and signed by the grand jury foreperson on October 5, 2006. However, the Williamsburg County Grand Jury did not convene for the October 2006 term until October 9, 2006. Appellant submits this issue "*was inadequately raised in the original, supplemental or amended application.*"

Appellant submits he has made at least two (2) good faith efforts and one (1) motion for discovery to obtain the docket/scheduling calendar of the October 2006 Grand Jury term; all to no avail.

This issue was Trial counsel failed to ascertain the fundamental defect in the indictment and did not move to quash the defective instrument.

The affidavit of Shanda Cullum (attached - and submitted to the PCR Court) avers that trial counsel, Legrand Carraway, Esq., was concerned only with rushing Appellant to plead guilty and not with mounting a viable defense.

PCR counsel, Charles T. Brooks, III, Esq., failed to adequately raise the substance of this ineffective assistance claim concerning an indictment that deprived the trial court of jurisdiction in this matter.

Appellant asserts the trial court did not have subject matter jurisdiction to accept his guilty plea to the murder indictment because the indictment was "true-billed" and signed by the Grand Jury Foreperson prior to the Grand Jury term being convened.

It should be noted the parties cannot confer subject matter jurisdiction by consent, *Plante v. State*, 315 S.C. 562, 446 S.E. 2d 437 (1994). Proceedings in a court of general jurisdiction will be presumed regular absent evidence to the contrary, *Pringle v. State*, 287 S.C. 409, 339S.E. 2d 127 (1986). The *Pringle* Court found the foreman's signature is not essential to the validity of the indictment; however, Appellant here asserts the date of that signature is an element if that Grand Jury was not in session at the time or just ended.

This is not merely a scrivener's error. The document bears a date *inconsistent* with the grand jury term. An almost identical scenario transpired in *Anderson v. State*, 338 S.C. 629, 527 S.E. 2d 398 (Ct. App. 2000). As in *Anderson*, the Appellant here

requested identical relief; remand the case for a hearing on whether the trial court was properly vested with subject matter jurisdiction during [Appellant's] murder trial. At the hearing, the State shall bear the burden of proving subject matter jurisdiction [where Appellant has diligently sought to discover such evidence from the state.] The hearing should be to determine whether the indictment was properly true-billed.

Appellant contends trial counsel's failure to inspect the indictment and PCR counsel's negligence in adequately raising this issue constitute "sufficient reason" and unique facts to overcome a successive bar.

ii. PCR counsel failed to amend and present the issue trial counsel did not prepare a viable defense by utilizing the only eye witness.

Appellant contends that the only eye witness to whether Appellant had a weapon prior to confronting the victim was a viable self-defense theory witness. PCR counsel was negligent in failing to amend the issue and secure the presence of the witness to rebut trial counsel's version of the witnesses' proposed testimony. Appellant had a Sixth Amendment right to compulsory process which would have changed the out come of the hearing.

Appellant suggests this is a unique fact where PCR counsel was intimately aware the burden to present witness testimony was on the Appellant to establish.

iii. Trial counsel coerced Appellant to plead guilty and this amounted to a denial of counsel and a miscarriage of justice.

Appellant suggests that PCR counsel was negligent in failing to pursue trial counsel coercing Appellant to plead guilty. Appellant contends that the affidavit of Shanda Cullum, *id*, substantiates counsel's coercive efforts to force Appellant to plead

guilty. Counsel's actions constitute a denial of the Sixth Amendment right to counsel at a critical stage of trial. *United States v. Cronin*, 466 U.S. 648 (1984).

SUMMARY

There are genuine issues and questions of facts that remain to be determined which obviate summary dismissal under § 17-27-70 (b). When considering the State's motion for summary judgment the PCR Court "must assume facts presented by the Applicant are true and view those facts in the light most favorable to the Applicant." *Wilson v. State*, 348 S.C. 215, 559 S.E. 2d 581, 582 (2002). In the case of a Conditional Order, as was before the PCR Court here, "disposition of the pleadings and record is not proper if there exists a material issue of fact," *Wilson, supra*.

The interest of justice requires a court to entertain this second timely, yet successive application in light of the "unique facts" presented. *See, e.g., Case v. State, supra*.

It is indeed novel that the Appellant here has filed a successive application and remained within the statute of limitations. This novelty allowed the lower court more leeway in ordering an evidentiary hearing and this matter should be remanded for an evidentiary hearing. Appellant could and did raise the issues, which are "generally" barred, but this case falls squarely within the exception of "inadequately raised."

The Appellant has demonstrated that the lower Court's refusal to hear the claim(s) would constitute a "gross miscarriage of justice." *Aice*, 305 S.C. at 451, 409 S.E.2d at 394.

A hearing was necessary here where factual allegations that led to the constitutional deprivations are not conclusively refuted by the record, *see Delaney v. State*, 269 S.C. 555, 238 S.E. 2d 679 (1977).

CONCLUSION

WHEREFORE, Appellant prays this Honorable Court remand this matter to the lower court for an evidentiary hearing.

Respectfully Submitted,

November 21, 2013



Jamel Alexandrette

#231631

Lieber Corr. Inst. SA-49

P.O. Box 205

Ridgeville, SC 29472-0205

APPELLANT, pro se

State Of South Carolina
County of Williamsburg

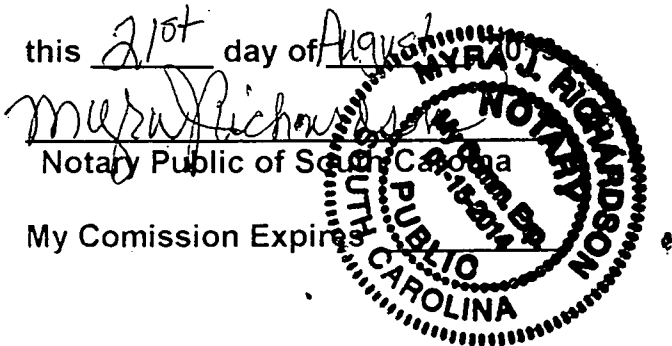
Affidavit of Shanda Cullum

Personally appeared before me Shanda Cullum who deposes and says:

- 1) I am the blood-related sister of Jamel Alexandrette.
- 2) That Jamel was arrested in June 2006 for the murder of Eugene Williams
- 3) Jamel complained that no attorney came to visit him until late in April 2007
- 4) That Jamel's attorney, Legrand Carraway, never contacted me or any family member regarding possible witnesses for Jamel
- 5) That Jamel asked that I be present for a discussion between him and Mr. Carraway the day the trial was scheduled.
- 6) That Jamel continually insisted he wanted a jury trial and did not want to plead guilty, as urged by Mr. Carraway and others present.
- 7) That the investigator was periodically present during the discussions between Jamel and Mr. Carraway
- 8) That the investigator told Jamel "he was stupid" if he did not plead guilty.
- 9) That Mr. Carraway told Jamel that he spoke with the Judge and the Judge said he would give Jamel between 27-30 years, or if he went to trial, he would give him life.
- 10) That Mr. Carraway told Jamel if Jamel went into the courtroom and took a Jury trial that Jamel was "on his own".
- 11) That knowing my brother all his life I could see by his apprehension that he had no confidence in Mr. Carraway representing him.

Sworn to and Subscribed before me

this 21st day of August



Myra J. Richardson
Notary Public of South Carolina

My Commission Expires

Shanda Cullum
Name
Address P.O. Box 882
Hemingway, SC 29554