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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County

George C. James, Jr., Circuit Court Judge

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S.C. Supreme Court

MICHAEL L. MCFADDEN

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001121

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

The PCR judge erred in dismissing petitioner's instant PCR action without holding a hearing per Sharper[1] because petitioner's newly discovered evidence claim of actual innocence supported by a witness' affidavit swearing to petitioner's innocence established a genuine issue of material fact not conclusively refuted by the record in the case.

[1] Sharper v. State, 279 S.C. 264, 305 S.E. 2d 626 (1977).

STATEMENT

Petitioner Michael L. McFadden was convicted of armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime per a jury trial held at the April 1992 term of Williamsburg County General Sessions Court before Judge D. Marion Shuler. Petitioner was sentenced to imprisonment for an aggregate period of sixty years in the case. Legrand Carraway represented petitioner at trial, and Assistant Solicitors Clifton Newman and Wells Dickson appeared on behalf of the state in the case. App. 1 – 261.

Petitioner appealed, but his convictions and sentences were affirmed on appeal. State v. McFadden, Op.No. 94-MO-21 (S.C. filed February 1, 1994). Robert M. Dudek represented petitioner on direct appeal.

On April 9, 2012, petitioner filed the instant PCR application with the Williamsburg County Office of the Clerk of Court alleging newly discovered evidence in support of his actual innocence claim. App. 262-267. On September 6, 2012, the respondent filed a return and motion to dismiss alleging that petitioner's PCR action was successive and untimely filed. App. 268-274.[2]

On October 24, 2012, Judge R. Ferrell Cothran filed a Conditional Order of Dismissal in response to petitioner's instant PCR action echoing the respondent's position that the action was successive and untimely filed. App. 277-282. On November 27, 2012, petitioner filed a response to the Conditional Order of Dismissal that included the affidavit of a new witness (Keith Pressley) admitting to facts tending to support his (petitioner's) actual innocence claim as a newly discovered evidence in the case. App. 283-293.

[2] Petitioner previously filed four prior PCR actions. App. 278 – 279.

No PCR hearing was ever held in response to the instant PCR action. On April 21, 2013, Judge George C. James, Jr., issued a Final Order denying PCR relief to petitioner. Petitioner appealed Judge James' Final Order. This petition follows.

ARGUMENT

The PCR judge erred in dismissing petitioner's instant PCR action without holding a hearing per Sharper[3] because petitioner's newly discovered evidence claim of actual innocence supported by a witness' affidavit swearing to petitioner's innocence established a genuine issue of material fact not conclusively refuted by the record in the case.

At trial, Melissa Rogers testified that she was working at the front desk at Clemmons Video Store in Williamsburg County around 8:30 p.

m. to 9:00 p.m. on October 28, 1991, when a male entered and asked for a store membership card. Rogers explained that when she went behind the counter to get an application, the male followed her, grabbed her arm, and told her to open up the register. Rogers stated that after she opened the register, the male put her in a tanning room in the back, tied her up, and took her necklace and five rings, and then fled. Police were called to the scene shortly thereafter. App. 60, l. 2 – p. 75, l. 19. Rogers later identified petitioner's picture in a photographic line-up shown to her by police. App. 95, l.5- 17; App. 79, 1. 7 – p. 82, 1.22; App. 109, l. 19-23.

The investigation that followed led police officers to the home of the Sondra Faye Pendergrass, which was where petitioner spent the night after the robbery. App. 102, l. 1-14. Ms. Pendergrass testified at trial and admitted that petitioner came by her house on the night of the robbery, which had happened unbeknownst to her, and gave her some rings. Pendergrass added that

[3]Sharper v. State, 279 S.C. 264, 305 S.E. 2d 626 (1977).

later on, the police officers appeared at her home inquiring about jewelry, and that she gave them the rings she had received from petitioner. App. 133, l.7-p.142, l.9

Francis Wagner testified that petitioner approached him a few days after the robbery with a gold chain for sale, and that he (Wagner) bought the chain for $20.00 and then turned over the chain to police. App. 142, l. 21- p. 146, l. 10.

Defense witness Corey Fulton testified that he witnessed Michael Johnson sell the jewelry in question to petitioner. The inference was that the robber was not petitioner, but rather Michael Johnson. App. 179, l.17- p. 182, l.25. Note that petitioner did not testify at trial.

In the instant PCR action, petitioner submitted an affidavit from Keith Pressley who swore that he lied to police in telling them that petitioner robbed the store cashier of jewelry because petitioner purchased the jewelry instead. App. 293. Pressley submitted this affidavit dated January 31, 2012, to petitioner; and thereafter, petitioner submitted the affidavit as newly discovered evidence via a PCR application dated April 9, 2012, which was within one year of the discovery as required per S.C. Code Ann. §17-27-45(c).

The PCR judge did not address petitioner's newly discovered evidence claim, but rather dismissed the PCR action by as successive and untimely filed. App. 294-296.

As a rule, newly discovered evidence that would warrant the grant of a new trial is evidence that would change the result if a new trial were granted, and was discovered since the trial and could not have been discovered prior to trial, and would constitute material evidence that was not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983).

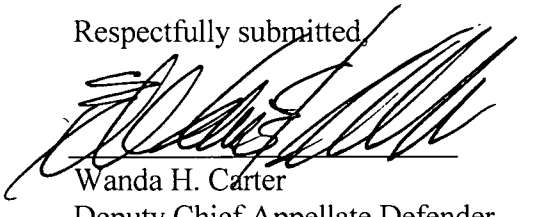
Here, petitioner presented an actual innocence claim via newly discovered evidence exonerating petitioner of the crimes charged against him. This qualified as material evidence that would warrant the grant of a new trial and change the result if a new trial were had, particularly

since Pressley, who was the affidavit witness, would have corroborated the testimony of defense witness Fulton, who testified at trial that petitioner purchased the jewelry and did not rob anyone for the same. Pressely's testimony would have constituted corroborative (not cumulative) evidence of petitioner's claim of innocence. Although petitioner had four prior PCR actions, he could not previously have discovered this evidence (Pressley's admission that supported petitioner's actual innocence claim) as he had no control over Pressley's moral inclination to be truthful about his case and submit an affidavit to this effect as proof. Undoubtedly, petitioner presented newly discovered evidence in this PCR action worthy of entertaining at a hearing.

CONCLUSION

Based on the above argument, petitioner requests that this court allow full briefing on the issue of the PCR court's error in dismissing his newly discovered evidence PCR claim of actual innocence without holding a hearing per Sharper because a genuine issue of fact not conclusively refuted by the record existed in the case.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of January, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO WILLIAMSBURG COUNTY
GEORGE C. JAMES, JR., CIRCUIT COURT JUDGE

MICHAEL L. MCFADDEN

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000121

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael D. McFadden states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on n/a. In her opinion seeking certiorari from the order of dismissal is without merit.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Michael D. McFadden.

Respectfully submitted,

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 3rd day of January, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County

George C. James, Jr., Circuit Court Judge

MICHAEL L. MCFADDEN

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000121

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Michael D. McFadden, #126806, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 3rd day of January, 2014.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day of January, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.