

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

John C. Hayes, III, Circuit Court Judge

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JAN 15 2014

S.C. Supreme Court

JIMMY CHARLES KENDALL, III,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-001800

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in summarily dismissing Petitioner's post-conviction relief application on the ground that Petitioner's allegation was procedurally barred by the Uniform Post-Conviction Procedure Act where Petitioner's assertion that he did not knowingly and intelligently waive his Sixth Amendment right to counsel is expressly permitted under the Act which permits any person who claims his "conviction or sentence was in violation of the Constitution of the United States" to institute a proceeding?

STATEMENT

Indictment

On July 21, 2011, Petitioner Jimmy Charles Kendall, III was indicted by the York County Grand Jury for one count of murder. App. 72-73.

Motion to Relieve Counsel

On November 2, 2011, Petitioner appeared before the Honorable John C. Hayes, III on Petitioner's motion to relieve his appointed counsel. App. 1 – 6. Philip L. Smith was appointed counsel for Petitioner. App. 1. Deputy Solicitor Walter William Thompson Sr. represented the State. Id.

Petitioner indicated his dissatisfaction with his appointed attorney and asked for another attorney. App. 4, l. 24 – 5, l. 10. The court informed Petitioner that he did not get to choose his appointed counsel and if the court relieved Mr. Smith, that would leave Petitioner without an attorney. App. 5, ll. 11-20. The court asked Petitioner if that was what he wanted to do and Petitioner responded in the affirmative. App. 5, ll. 22-23. The court then advised Petitioner that there was a danger in representing himself, that an attorney could benefit him, and that he was entitled to an attorney. The court appointed Mr. Smith to serve as stand-by counsel at Petitioner's trial. App. 5, l. 24 – 6, l. 6.

Guilty Plea

On November 29, 2011, Petitioner appeared before the Honorable Lee S. Alford to plead guilty to the charge of murder under North Carolina v. Alford, 400 U.S. 25 (1970). App. 8 – 21. Mr. Smith served as Petitioner's stand-by counsel, and Deputy Solicitor Thompson represented the State. App. 8; 10. The court accepted Petitioner's plea, but deferred sentencing. App. 20.

On January 23, 2012, Petitioner again appeared before Judge Alford for sentencing. App. 23-36. Mr. Smith served as Petitioner's stand-by counsel, and Solicitor Kevin Brackett represented the State. App. 23; 25. Judge Alford sentenced Petitioner to thirty years for murder. App. 35, ll. 19-23.

Petitioner did not file a direct appeal of his sentence.

Application for Post-Conviction Relief and the PCR Court's Dismissal of the Application without Holding an Evidentiary Hearing

On February 29, 2012, Petitioner filed an application for post-conviction relief ("PCR"). App. 38-46. The State, represented by Assistant Attorney General J. Rutledge Johnson, filed a Return and Motion to Dismiss on May 15, 2012, asserting that Petitioner failed to allege a claim of ineffective assistance of counsel and therefore his PCR application should be summarily dismissed. App. 47-51.

The Honorable John C. Hayes, III issued a Conditional Order of Dismissal on May 30, 2012, ordering that the court intended to dismiss the application with prejudice unless Petitioner provided "specific reasons, factual or legal, why the Application should not be dismissed in its entirety." App. 52-55.

Petitioner initially filed a *pro se* response to the Conditional Order of Dismissal on June 18, 2012, but this response was stricken as Petitioner was represented by counsel in his PCR case. App. 56-59.

Petitioner's PCR counsel, Julia McCarley Bass, then filed a response to the Conditional Order of Dismissal on May 9, 2013 after having received an extension to file the response. App. 63-67. In this response, Petitioner alleged that the Trial Court erred in allowing him to proceed with his *pro se* guilty plea where his waiver of his Sixth Amendment right to counsel was not knowingly and intelligently made. App. 64.

Petitioner moved the PCR court “to dismiss the Conditional Order of Dismissal and to order a full hearing on the merits of his Application for Post-Conviction Relief, as he asserts that he did not possess the skill and experience necessary in order to competently and intelligently choose to waive his constitutional right to counsel and to choose self-representation.” App. 67. Petitioner asserted that he did not knowingly and intelligently waive his right to counsel where, among other things:

1. he had extreme difficulty understanding the English language, in both written and spoken form;
2. he had asked his previous attorney for a mental health evaluation to address his mental health issues, his need for medication, his competency and his understanding of the legal proceedings but was denied the same;
3. he had only attended public schools into the ninth grade and was employed as a lawn care worker; and
4. he felt neglected and mistreated by his court-appointed attorney who failed to obtain a necessary mental health examination, failed to visit him for months at a time, and failed to answer Petitioner’s questions based in part due to what Petitioner perceived was his attorney’s overwhelming caseload as a public defender.

App. 65.

Petitioner also asserted that there was nothing in the record which indicated that the Trial Court considered the following when allowing Petitioner to proceed *pro se*:

1. Petitioner’s age, educational background, and physical and mental health;
2. whether Petitioner was previously involved in criminal trials;
3. whether Petitioner knew of the nature of the charge and of the possible penalties;
4. whether Petitioner was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case;

5. whether Petitioner was attempting to delay or manipulate the proceedings;
6. whether Petitioner knew he would be required to comply with the rules of procedure at trial;
7. whether Petitioner knew of the legal challenges he could raise in defense to the charges against him;
8. whether the exchange between Petitioner and the court consisted of merely *pro forma* answers to *pro forma* questions; and
9. whether Petitioner's waiver resulted from either coercion or mistreatment in determining if a defendant had sufficient background to understand the disadvantages of self-representation.

App. 66.

Judge Hayes issued his Final Order of Dismissal on August 1, 2013. App. 68-70.

In the Order, Judge Hayes concluded that whether Petitioner knowingly and intelligently waived his right to counsel was not a proper allegation for post-conviction relief:

This allegation raises a direct appeal issue that is procedurally barred by S.C. CODE ANN. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The [Petitioner] could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Once the [Petitioner] decides to represent himself, there cease to exist a claim for ineffective assistance of counsel. Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

App. 69.

Judge Hayes accordingly dismissed Petitioner's PCR application with prejudice. Id.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in summarily dismissing Petitioner’s post-conviction relief application on the ground that Petitioner’s allegation was procedurally barred by the Uniform Post-Conviction Procedure Act where Petitioner’s assertion that he did not knowingly and intelligently waive his Sixth Amendment right to counsel is expressly permitted under the Act which permits any person who claims his “conviction or sentence was in violation of the Constitution of the United States” to institute a proceeding.

The PCR court erred in ruling that the allegation raised by Petitioner in his PCR proceeding was a direct appeal issue that was procedurally barred by S.C. CODE ANN. § 17-27-20(B). Petitioner raised the allegation that the Trial Court erred in allowing him to proceed with his guilty plea *pro se* where his waiver of his Sixth Amendment right to counsel was not knowingly and intelligently made as required by the United States Supreme Court’s decision in Faretta v. California, 422 U.S. 806 (1975) (requiring that an accused be made aware of his right to counsel and of the dangers and disadvantages of self-representation prior to waiving the right to counsel). The allegation that Petitioner’s conviction was in violation of his constitutional rights is a proper allegation for post-conviction relief.

Under the Uniform Post-Conviction Procedure Act (the “Act”):

Any person who has been convicted of, or sentenced for, a crime and who claims:

(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State

...

may institute . . . a proceeding under this chapter to secure relief.

S.C. CODE ANN. § 17-27-20(A)(1).

The Act therefore expressly permits claims relating to convictions obtained in violation of a petitioner's constitutional rights. In fact, this Court has on multiple occasions granted post-conviction relief where a defendant has entered a *pro se* guilty plea but did not knowingly and intelligently waive the right to counsel. See Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002) (reversing denial of post-conviction relief where evidence was insufficient to support finding that defendant understood the dangers of self-representation and knowingly and intelligently waived his right to counsel when he pled guilty); Watts v. State, 347 S.C. 399, 556 S.E.2d 368 (2001) (reversing denial of post-conviction relief where the judge did not effectively warn petitioner of the dangers of appearing *pro se* to plead guilty and failed to make a meaningful inquiry into his background to determine whether he had sufficient experience or knowledge to waive counsel); Stevenson v. State, 337 S.C. 23, 522 S.E.2d 343 (1999) (reversing denial of post-conviction relief where record did not demonstrate that defendant was sufficiently aware of the dangers of self-representation to make informed decision to proceed *pro se* during plea proceeding and thus petitioner did not validly waive her right to counsel); Salley v. State, 306 S.C. 213, 410 S.E.2d 921 (1991) (reversing denial of post-conviction relief where trial court erred in finding that probationer who pled guilty to various crimes committed while she was on probation had validly waived her right to counsel); Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (1990) (reversing denial of post-conviction relief where defendant was not made sufficiently aware of the dangers of self-representation to make informed decision to proceed with his *pro se* guilty plea); Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990) (reversing denial of post-conviction relief where the record did not demonstrate that petitioner was sufficiently aware of the dangers of self-

representation to make an informed decision to proceed with his *pro se* guilty plea); see also Bridwell v. State, 306 S.C. 518, 413 S.E.2d 30 (1992) (reversing the denial of post-conviction relief where defendant's waiver of his right to counsel at trial was not knowing and voluntary).

The PCR court's dismissal of Petitioner's PCR application is therefore an error as a matter of law where Petitioner's allegation is not procedurally barred by § 17-27-20(B). "In a PCR action, if the record fails to demonstrate the petitioner made an informed choice to proceed *pro se*, with "eyes open," then the petitioner did not make a knowing and voluntary waiver of counsel." Gardner, 351 S.C. at 412, 570 S.E.2d at 186.

Petitioner therefore requests this Court to reverse the PCR court's denial and dismissal of his PCR application and to remand the case to determine whether Petitioner made a knowing and intelligent waiver of the right to counsel. See State v. McLauren, 349 S.C. 488, 493, 563 S.E.2d 346, 348 (Ct. App. 2002) (finding "the ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the [circuit court's] advice, but the defendant's understanding"); Wroten, 301 S.C. at 294, 391 S.C. at 576 ("While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding.").

CONCLUSION

Based upon the foregoing reasons, Petitioner Jimmy Charles Kendall, III requests that his Petition for Writ of Certiorari be granted with the ultimate relief of a reversal of the PCR court's dismissal of his PCR application on the grounds that it was procedurally barred by S.C. CODE ANN. § 17-27-20(B) . The case should then be remanded for a full evidentiary hearing on whether Petitioner is entitled to post-conviction relief.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of January, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County
John C. Hayes, III, Circuit Court Judge

JIMMY CHARLES KENDALL, III,

PETITIONER,

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STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

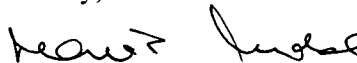
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Jimmy Kendall, III, # 319409, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 15th day of January, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of January, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.