

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO ABBEVILLE COUNTY
Court of Common Pleas

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FEB 21 2014

The Honorable R. Lawton McIntosh, Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2012-213701

Shondray Lamont Martin,.....Petitioner,

v.

State of South Carolina,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the PCR court properly dismiss Petitioner's PCR application with prejudice for failure to file within the one-year statute of limitations?

STATEMENT OF THE CASE

Shondray Martin, (Petitioner), was indicted at the April 2002 term of the Abbeville County Grand Jury for Criminal Conspiracy (2002-GS-01-0192, Count One), Attempted Armed Robbery (2002-GS-01-0192, Count Two), Murder (2002-GS-01-0192, Count Three), and Possession of a Firearm or Knife During the Commission of a Violent Crime (2002-GS-01-0192, Count Four). W. Benjamin McClain, Jr., Esquire, represented Petitioner. On March 15, 2004, Petitioner proceeded to a trial by jury before the Honorable Wyatt T. Saunders. At the conclusion of the State's case, the trial court granted defense counsel's motion for a directed verdict on the charge of Attempted Armed Robbery. On March 20, 2004, Petitioner was found guilty as charged of Conspiracy, Murder, and Possession of a Firearm or Knife During the Commission of a Violent Crime. Petitioner was sentenced to life imprisonment for murder, consecutive to a federal sentence he was already serving five (5) years for Conspiracy, and five (5) years for the possession charge. The sentences were run consecutive to each other and to the sentence Petitioner was already serving for unrelated charges.

A timely Notice of Appeal was filed, and an Anders brief¹ was submitted on the Petitioner's behalf. Petitioner also filed a pro se brief. The South Carolina Court of Appeals dismissed the appeal. State v. Martin, Op. No. 2007-UP-241 (S.C. Ct. App. filed May 17, 2007). Petitioner submitted a pro se Petition for Rehearing, dated May 24, 2007. The State made its Return to Pro Se Petition for Rehearing on June 8, 2007. The Court of Appeals denied Petitioner's petition by Order dated June 28, 2007. The Remittitur was issued on August 3, 2007.

¹ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967).

Petitioner subsequently filed an application for post-conviction relief (PCR) on September 28, 2009 (2009-CP-01-0238). Respondent made its Return and Motion to Dismiss on December 19, 2011. The Honorable Eugene C. Griffith, Jr. issued a Conditional Order of Dismissal on December 21, 2011. Petitioner made a timely response to the Conditional Order of Dismissal on January 10, 2012. An evidentiary hearing into the matter was convened on November 27, 2012, at the Laurens County Courthouse. Kristy Grafton Goldberg, Esquire represented Petitioner. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On December 20, 2012, the Honorable R. Lawton McIntosh denied and dismissed Petitioner's application with prejudice by written Order. Petitioner subsequently filed a Petition for Writ of Certiorari. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard for reviewing a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

The PCR court properly dismissed Petitioner's PCR application with prejudice for failure to file within the one-year statute of limitations.

Petitioner asserts “[t]he PCR court erred in dismissing Petitioner’s PCR application with prejudice for failure to comply with the one-year statute of limitations where (1) Petitioner mailed his PCR application to the Abbeville County Clerk of Court within the statute of limitations period and this application was found in the Clerk’s file; or (2) the statute of limitations should be equitably tolled when Petitioner sent his PCR application to the Clerk within the statute of limitations but this application was defective and he subsequently filed a corrected application outside the limitations period.” (Pet. Brief p. 8). This argument is without merit.

First, S.C. Code Ann. § 17-27-40 states: “A proceeding is commenced by *filing* an application *verified* by the applicant with the clerk of court in which the conviction took place.” (emphases added).

Second, S.C. Code Ann. § 17-27-45(A) states: “An application for relief filed pursuant to this chapter *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...*” (emphases added).

Third, “[i]t is clear under South Carolina law that mailing does not constitute filing. When a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer.” Gary v. State, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001).

At the PCR hearing, Petitioner testified he understood the remittitur in his case was issued on August 3, 2007 and had one year from that date in which to file his PCR application.

(App. p. 1307 line 21- p. 1308 line 5). Petitioner also testified he drafted his original PCR application and the date of June 23, 2008 was written on the document. (App. p. 1308 line 22- p. 1309 line 7). However, he admitted he did not have this application notarized in any way. (App. p. 1309 lines 8-9). While Petitioner stated he believed he sent the application through the certified mailing process on the same day he drafted the application, he admitted he did not have any proof of the return receipt or a date-stamped envelope showing he attempted to file his application prior to the one-year statute of limitations. (App. p. 1311 lines 1-14; p. 1321 line 14- p. 1322 line 23).

Clearly, Petitioner failed to file his PCR application on or before the August 4, 2008 deadline. While he claims he mailed his application on June 23, 2008, Petitioner produced no evidence at the PCR hearing whatsoever, besides his own self-serving testimony, showing he mailed and the Abbeville County Clerk of Court's Office received this application. Petitioner admitted he understood the certified mailing process, but failed to provide the return receipt or a date-stamped envelope. The Abbeville Clerk of Court Office's file was also void of any evidence that it received an application on or before the filing deadline. See App. p. 1403-1461. The first acknowledgement from the Abbeville Clerk of Court's Office of correspondence from Petitioner is a letter dated June 12, 2009 stating the Common Pleas Clerk reviewed all files and indexing system and found no record of a PCR application filed by Petitioner. (App. p. 1454).

Under S.C. Code Ann. 17-27-45(A), Petitioner must have filed, not mailed, his application within one year after the sending of the remittitur to the lower court. The filing must have occurred on or before August 4, 2008; however, Petitioner's application was not filed with the Abbeville Court Clerk of Court's Office until September 28, 2009. Further, pursuant to Gary

v. State, 347 S.C. 627, 557 S.E.2d 662 (2001), Petitioner’s application was considered filed when it was delivered to and received by the proper officer. As such, the filing of Petitioner’s application was September 28, 2009, the date which the Abbeville County Clerk’s Office received and date-stamped the application. Therefore, the PCR judge properly held Petitioner’s filing of his PCR application was beyond the statute of limitations.

Alternatively, Petitioner argues “the statute of limitations should be equitably tolled when Petitioner sent his PCR application to the Clerk within the statute of limitations but this application was defective and he subsequently filed a corrected application outside the limitations period.” (Pet. Br. p. 8) This issue is not preserved for appeal.

“To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal.” State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996); see also Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999) (issue not addressed by PCR judge is not preserved for review). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974).

This issue was not alleged by Petitioner, argued at the PCR hearing, or ruled upon by the PCR court. Therefore, it is not preserved for this appeal and cannot be presented for the first time on appeal.

Nonetheless, it is without merit. Petitioner relies on Pelzer v State, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008) for the doctrine of equitable tolling. Specifically, Petitioner argues he mailed his application to the Abbeville County Clerk of Court’s Office before the statute of limitations expired but his application was defective because it was not notarized. Petitioner

highlights the section that states that equitable tolling has been deemed available where “the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period.” Pelzer v State, 378 S.C. 516, 521, 662 S.E.2d 618, 620-21 (Ct. App. 2008). This argument is misguided.

In the case at bar, Petitioner provided no evidence, other than his self-serving testimony, that he mailed his application before the statute of limitations expired. The Abbeville County Clerk of Court’s Office had no record that he sent in his application on June 23, 2008. As stated above, pursuant to Gary v. State, mailing does not constitute filing. Therefore, Petitioner failed to “file” his PCR application. So, clearly Petitioner did not “file a defective pleading during the statutory period.”

Even under Pelzer’s logic, Petitioner’s argument fails as Petitioner never filed a PCR application before the expiration of the statute of limitations, defective or otherwise. The first correspondence in Abbeville County Clerk of Court’s Office’s file is from Petitioner on May 30, 2009. This is almost an entire year after he allegedly mailed his PCR application to the Abbeville County Clerk of Court’s Office. Thus, Petitioner failed to actively pursue his judicial remedies as he waited almost an entire year before inquiring as to the status of his PCR application. Clearly, equitable tolling does not apply in this case.

Sufficient “evidence of probative value” exists to sustain the PCR judge's findings that Petitioner failed to timely file a PCR application pursuant to S.C. Code Ann. § 17-27-45(A). Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Therefore, Petitioner has failed to meet his burden of proof as to this argument.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
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By:



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February 21, 2014

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Certiorari to Abbeville County

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The Honorable R. Lawton McIntosh, Circuit Court Judge

S.C. Supreme Court

SHONDRAY LAMONT MARTIN, 222785

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

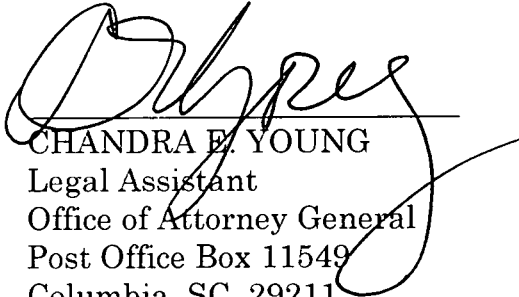
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire
1330 Lady Street; Suite 401
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served.

This 21st day of February 2014.



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ALAN WILSON
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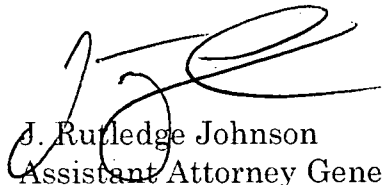
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

**RE: Shondray Martin, 222785 v. State of South Carolina
2012-213701**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,



J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: Carmen V. Ganjehsani, Esquire
Trisha Allen, Victim Services