

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

RECEIVED

MAR 20 2014

S.C. Supreme Court

MAURICE A. KELLEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2011-192810

SUPPLEMENTAL APPENDIX

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
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ATTORNEYS FOR RESPONDENT

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MOTION TO OBJECT/RECONSIDER DATED NOVEMBER9, 2010.....1

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The Honorable Jeanette W. McBride
Clerk of Court Richland County
P.O. Box 2766
Columbia S.C. 29202

RE: Maurice Kelley v. State
(2009-CP-400-5753)

Mrs. McBride,

Enclosed with this letter
is my Motion in response to the state's
Motion to Dismiss my P.C.R. application
filed with your office on Oct 19, 2010.
Please attach the exhibits to it and
file it for the record. Also, if you may,
would you please send me back a filed
copy. Thanks for your assistance and I
hope you enjoy the rest of your day...

Date 11-1-10

Maurice Kelley
Maurice Kelley
#288629 S.M.O.B-73
386 Redemption way
McCormick S.C.
29899

State of South Carolina)
County of Richland)
Maurice A KELLEY, 288629)
Applicant,)

In The Court of Common Pleas.
C.A. NO. 2009-CP-400-5753

v.

State of South Carolina)
Respondents.)

Motion To Object & Reconsider:

2010 NOV 9 AM 9:22
JEANE DE W. MCBRIDE
C.S. & G.S.
RICHLAND COUNTY
FILED

To: The Honorable Alison R. LEE/Presiding Judge/Fifth Judicial Circuit/Richland County:

In response to the state's Motion to Dismiss the Applicant Post-Conviction Relief Application in the above referenced case filed on October 19, 2010 the Applicant does object and would like to show this Honorable Court that his Motion is based upon the following grounds:

- 1). That the state's Motion to Dismiss and cases cited therein have no bearing on the instant case.
- 2). That the P.C.R. attorney for the Applicant provided him with ineffective assistance of Counsel in the first Proceeding and that he was pre-judiced by the deficient performance.
- 3). That the Final Order issued by the Honorable

P.C.R. Judge L. Casey Manning did not address the Applicant's conflict of interest issue raised at the evidentiary hearing held May 19, 2006 as required by Pruitt v. State 423 SE2d 127 (1992); and McCray v. State 408 SE2d 241 (1992).

4). That Applicant never voluntarily, knowingly or intelligently waive his right to appeal the denial of his P.C.R. and is entitled to his One bite at the apple. Austin v. State 409 S.E2d 395 (1991).

5). That lack of Subject Matter Jurisdiction may not be waived and may be raised at any time, including on this Courts on Motion. Carter v. State, 495 S.E2d 773, 777 (1998); Also S.C. Code Ann. 317-19-10 (1985)

In this present Motion, the Applicant contends that his allegations are based upon specific facts concerning his first P.C.R. and the irregularities involved in the Proceeding and prays that this Honorable Court take's his Motion into consideration.

Please view the exhibits and Memorandum in support of Law that the Applicant has attached to this Motion to support his claims.

"Memorandum in support of Law"

-Ineffective Assistance of P.C.R. Counsel-

The Applicant was denied his Sixth and Fourteenth Amendment right to effective assistance of appellate counsel, where Post-conviction counsel 1). Failed to amend the applicants pro se Post-conviction application to include all grounds presented in the present application, 2). Failed to ensure that all issues raised get properly addressed in Judge's Order and 3). Failed to file a timely notice of appeal in applicants case.

Facts

After preparing and submitting my pro se application for Post-conviction relief, I was appointed Charlie Johnson Jr. to represent me in the matter. Thereafter, I wrote Post-conviction counsel inquiring about amending my pro se application to include the supporting ~~grounds~~ grounds of ineffective assistance of Plea Counsel which appear in the present application. I was informed that he would be reviewing my case and all the materials I sent him concerning possible additional issues and that a personal visit to my institution would be scheduled before the hearing. Upon visiting with me I conveyed to Post-conviction counsel that I never viewed or received the Autopsy reports or any indictments in my Motion of Discovery prior to my guilty plea and that I had just received the original indictments from the clerk of Court on or about October 29, 2004. I further explained that they weren't clocked stamped and filed by the clerk of Court or dated by the Grand Jury Foreman and that my Plea attorney never advised me of every element of my charges. I told Post-conviction counsel that my Plea was involuntary and that if I would of

Known the nature of my indictments prior to my plea I would of never Plead guilty. So I again requested that Post-conviction counsel amend this issue to my application. However, Post-conviction counsel failed to do so and did not raise it during the evidentiary hearing. Being that I'm a Layman, I did not know how to present these claims in my prose application or at the evidentiary hearing, and as a result these grounds were not heard or roled upon, even though they could have resulted in me being granted a new trial. Nevertheless, Post-conviction counsel did request to amend the conflict of interest issue for the record at the evidentiary hearing when my Plea attorney took the stand and stated on the record that he represented one of my co-defendants prior to taking my case. However, that issue was not addressed in the P.C.R Judge's order because Post-conviction counsel failed to file a 59(e) to alter or amend the judgment or file a Proposed order in my behalf. Post-conviction counsel also failed to file a timely notice of appeal in my case. I was under the impression that my P.C.R. Action was still pending in the courts because I never received any type of notice from Post-conviction counsel after the hearing. After months of futilely trying to contact him I finally wrote the clerk of Court and was informed that an order was issued 14 Months after the hearing. Once I received that I wrote the Supreme Court and found out no appeal was filed in my case. So inevitably this present P.C.R. action ensued...

Law

S.C. Supreme Court Rules 50(s) and 71.1(d) Make it

mandatory, that post-conviction attorneys make sure that all available grounds are raised in post-conviction proceedings. After filing a pro se post-conviction application, and after being given court appointed counsel, a pro se litigant cannot thereafter file any further pleadings, and any amendments to his application must be made by counsel. State v. Sander 237 SE2d 53 (1977); Foster v. State 379 SE2d 907 (1989). Thus, if post conviction counsel does not amend the pro se application, the applicant has no way to have all supporting grounds heard.

Because the claim of ineffective assistance of Counsel cannot be exhausted until an application for P.C.R. is filed, S.C. litigants clearly have a right to effective assistance of counsel in presenting their claims of ineffective assistance of Trial Counsel. Evitts v. Lucey, 105 S.Ct. 830 (1985); Coleman v. Thompson III S.Ct. 2546 (1991).

As a result, when an applicant is not assisted by a post conviction attorney in setting forth all grounds to support his claim of ineffective assistance of Trial Counsel in his initial application, he shouldn't be barred thereafter from submitting a second application to include additional grounds for a Courts review.

In Carter v. State, 362 SE2d 20 (1987) and again in Aice, Supra, the S.C. Supreme Court cited Foxworth v. State 274 S.E2d 415 (1981); Land v. State, 262 SE2d 735 (1980), and S.C. Code Laws, Section 17-27-90 for the general proposition, that successive applications are viewed with disfavor and that the applicant has the burden of showing that a new ground for relief could not have been raised in a previous application. However, Aice, Supra, does not give attention to the Courts decision in Case v. State, 289 SE2d 413 (1982), which held that if the applicant meets the burden, a hearing must be afforded despite the successiveness of the application.

In a situation where post conviction applicant is

not assisted by his post conviction attorney in properly amending his first application to include all supporting grounds underlying a claim of ineffective assistance of Trial Counsel, and does not know of such grounds, or does not know how to raise them, and is barred from presenting pro se pleadings in light of State v. Sanders, Supra, and Foster v. State, Supra, he must be seen to be "without Counsel" and in the same position as that of the applicant in Case v. State, Supra. The Court, under such circumstances should find that the second application should be heard despite its successiveness because the first application lack specificity, unless it can find that the applicant intentionally waived his right to have grounds stated in the subsequent application heard in the first.

Pruitt v. State, 423 SE2d 127 (1992), require that P.C.R. Judge's orders shall address all issues properly raised at the hearing. Code Ann. 17-27-80. Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the P.C.R. Judge prior to issuance of the order, and the P.C.R. Judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e) S.C.R.C.P., motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by §17-27-80 and Rule 52(a) S.C.R.C.P.

If applicant can establish that he did not voluntarily waive his right to appeal, then Applicant is entitled to his "One bite at the Apple"

and this includes appeal from the denial of Post-Conviction relief Austin v State, 409 SE2d 395 (1991).

- Subject Matter Jurisdiction -

The applicant contends the Trial Court that accepted his guilty Plea lacked Subject Matter Jurisdiction because his indictments for Murder and Armed Robbery did not contain all the necessary elements of the offenses, they did not contain his signature waiving presentment to the Grand Jury, nor did he plead to an lesser included offense.

Facts

I did not receive any indictments prior to my Plea and I was never afforded a preliminary hearing for my murder charge in which I am aware of. I did not receive my indictments until directly after my first P.C.R. action was filed. Upon viewing them I was enlightened to the fact that they were never clocked stamped and filed by the clerk of Court or dated by the Grand Jury foreman. I also noticed that the indictments for Armed Robbery and Murder did not contain the element of a weapon, that I never signed a waiver of presentment to the Grand Jury, and that I did not Plead to an lesser included offense.

Law

The Circuit ~~and~~ Court does not have

Subject Matter Jurisdiction to conflict a defendant of an offense unless there is an indictment which sufficiently states the offense, the defendant waives presentment, or the offense is a lesser included offense of the crime charged in the indictment. State v. Mason, OP. NO. 2002-UP-774 (S.C. App. 2002)

The Subject Matter Jurisdiction of the Circuit Court over a matter is fundamental. Anderson v. Anderson, 382 SE2d 897 (1989), Issues Regarding whether the Circuit Court had Subject Matter Jurisdiction may be raised at any time. Brown v. State, 540 SE2d 848 (2001); State v. Smalls, 581 SE2d 850 (S.C. App. 2003).

Conclusion

Based upon the foregoing reasons of facts contained in this Motion, the Applicant contends that the State's Motion to Dismiss should not be upheld and that he should be entitled to proceed on his present Application Because Post conviction counsel provided ineffective assistance in the first proceeding in that he 1). Failed to amend applicant's prose application to include all available grounds for relief as prescribed by Rule 71.1(d) S.C.R.C.P. and as requested by the applicant 2). Failed to file a Rule 59(E) to alter and amend the judgment when all issues raised at the hearing was not properly addressed in the P.C.R. Judges order as required by Priddy v. State, Supra, and S.C. Code Ann. 17-27-80 and 3). Failed to file a timely notice of appeal. Thus, Post conviction Counsel was ineffective and the applicant was prejudiced by the deficient performance because he was unable to have all grounds available

for relief specifically raised and asserted, unable to have all issues heard properly addressed and preserved for the record, and unable to seek appellate review of the denial of his P.C.R. because he was unaware of these facts until months after the P.C.R. Judges order had become final.

Therefore, in light of the reasons explained herein, the applicant prays that this Honorable Court takes his Motion into Consideration.

Respectfully Submitted,

Maurice Kelley

Maurice Kelley #288629
S.M.J. B-73
386 Redemption Way
McCormick S.C.
29899

Date: 11-01-2010

Sworn to and Subscribed before
me this 1 day of November, 2010

Penny L. Mata
Notary Public

My Commission Expires: July 28, 2018