

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2013-002379

Ronald Coulter, #300410,

Appellant,

v.

State of South Carolina,

Respondent.

INITIAL BRIEF OF APPELLANT

Ronald Coulter, #300410

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Appellant, Pro Se

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SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 2

Arguments

1. THE LOWER COURT ERRED IN: (1) DISMISSING THE
APPELLANT'S DUE PROCESS CLAIM ON THE GROUNDS
THAT IT CANNOT BE HEARD IN A HABEAS CORPUS
PROCEEDING; AND, (2) FAILING TO ARTICULATE
THIS CONCLUSION IN THE FINAL ORDER 4

2. THE LOWER COURT ERRED IN MISCHARACTERIZING THE
APPELLANT'S FOURTEENTH AMENDMENT DUE PROCESS
CLAIM AS A MERE ADEQUACY OF PCR COUNSEL
ALLEGATION, THEREBY, DIMINISHING THE IMPLICATION
OF FUNDAMENTAL UNFAIRNESS 10

Conclusion 14

TABLE OF AUTHORITIES

CASES

<u>Boan v. State</u> , 695 S.E.2d 850 (2010)	8
<u>Cherry v. State</u> , 386 S.E.2d 624 (1989)	8
<u>Evitts v. Lucey</u> , 469 U.S. 387 (1985)	10
<u>Keeler v. Mauney</u> , 500 S.E.2d 123 (Ct.App.1998)	4
<u>Martinez v. Ryan</u> , 132 S.Ct. 1309 (2012)	13, 14
<u>Miranda v. Bennett</u> , 322 F.3d 171 (2nd Cir.2003)	8
<u>Ross v. Moffitt</u> , 417 U.S. 600 (1974)	10
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	5
<u>U.S. v. El Paso Natural Gas Co.</u> , 376 U.S. 651 (1964)	8

RULES

Rule 71.1 (d), South Carolina Rules of Civil Procedures ...	12
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STATEMENT OF ISSUES ON APPEAL

1. Whether the appellant had standing under S. C. Constitution article 1, section 18, and South Carolina Code of Laws 17-17-10 to 17-17-200 (1976), to reasonably raise the issue of whether the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States affords him a protected liberty interest, in the initial state post-conviction review of his Sixth Amendment ineffectiveness claim, that would have entitled him to the procedural protection against arbitrary state action; where the extraordinary recalcitrance of the state Post-Conviction Relief (PCR) court in failing to follow the mandate of federal law, in adjudicating the ineffectiveness claims, deprived the appellant of any indicium of reliability that the jurisdiction of the criminal trial court below was constitutionally validated during the state post-conviction proceeding.

2. Whether the appellant had standing under S. C. Constitution article 1, section 18, and South Carolina Code of Laws 17-17-10 to 17-17-200 (1976), to reasonably raise the issue of whether the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States entitled him to the effective assistance of counsel, as an equitable matter, in the initial state collateral review of his Sixth Amendment ineffectiveness claims; where, the State's post-conviction procedure appointed counsel for the indigent appellant to insure that all meritorious grounds for relief were included in the post-conviction application.

STATEMENT OF THE CASE

On February 23, 2004, the appellant proceeded to trial with his codefendant in the Court of General Sessions of Charleston County. On February 25, 2004, the appellant's codefendant reached a plea agreement and agreed to testify for the State against the appellant. Later that day, the appellant entered a negotiated guilty plea to kidnapping and was sentenced to thirty years. A timely appeal was not perfected.

On July 16, 2004, the appellant filed a pro se application for post-conviction relief (PCR) attacking the constitutionality of his conviction on the grounds of ineffective assistance of counsel pursuant to the Sixth Amendment to the Constitution of the United States. On June 23, 2005, the State filed its Return requesting an evidentiary hearing and appointed counsel for the appellant. An evidentiary hearing was held into the matter on June 2, 2006. On November 6, 2006, the PCR court issued an Order of Dismissal denying the appellant's application for relief. The appellant served and filed a timely notice of appeal. On May 19, 2008, the South Carolina Court of Appeals denied the appellant's writ of certiorari to the PCR court.

On August 4, 2008, the appellant filed a petition for writ of federal habeas corpus, which was denied on September 16, 2009. On August 10, 2010, the Court of Appeals denied leave to appeal. On December 1, 2011, the appellant's petition for mandamus relief was denied. The U.S. Supreme Court denied the appellant's writ of certiorari on October 1, 2012.

On April 11, 2013, the appellant's Petition for Writ of State Habeas Corpus and Application to Proceed Without Payment of Costs were filed in the circuit court of Charleston County. The circuit court held a hearing on the appellant's petition for state habeas on August 9, 2013. The court denied the appellant's petition, and a Form 4 Order was filed on August 22, 2013. The appellant filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRPC on September 13, 2013. The court denied the appellant's motion to amend on September 26, 2013, which was filed on September 30, 2013. The appellant served and filed a timely Notice of Appeal.

Arguments

I. THE LOWER COURT ERRED IN: (1) DISMISSING THE APPELLANT'S DUE PROCESS CLAIM ON THE GROUNDS THAT IT CANNOT BE PROPERLY HEARD IN A HABEAS CORPUS PROCEEDING: AND, (2) FAILING TO ARTICULATE THIS CONCLUSION IN THE FINAL ORDER.

Where a protected liberty interest emanating directly from the Due Process Clause of the United States Constitution is at stake in the initial collateral appeal under the Uniform Post-Conviction Procedure Act (the Act), state habeas corpus should be proper to consider the constitutionality of the actions of state officials under the Act, in order to preserve - not destroy - the safeguards of life and liberty under the U. S. Constitution; and, equally important, propose changes that could obviate procedural due process challenges to state action in federal court.

The Fourteenth Amendment to the Constitution of the United States provides that no person shall be deprived of life, liberty, or property without due process of law. U. S. Const. amend. XIV, § 1. Unlike substantive due process, which serves as a check against invalid government action, the procedural aspect of the Due Process Clause guarantees that an otherwise legitimate government action is administered fairly. Essentially, even if a state entity has the power to deprive a person of life, liberty, or property, the Constitution may require certain legal procedures to insure that the deprivation is neither arbitrary nor mistaken.

In Keeler v. Mauney, 500 S.E.2d 123 (Ct.App.1998), this Court acknowledged that, "The due process clause of Fourteenth Amendment

to the Constitution of the United States protect citizens against state action. When the United States Supreme Court enunciates a rule based upon the Fourteenth Amendment, that rule is binding upon state courts through the Supremacy Clause." (citing Henry v. City of Rock Hill, 376 U.S. 776, 84 S.Ct. 1042 (1964)).

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court established the proper constitutional standard, pursuant to the Sixth and Fourteenth Amendments, for lower courts to adjudicate claims of attorney ineffectiveness. Since the Sixth Amendment constitutionally entitled the appellant to the effective assistance of trial counsel, compliance with this constitutional mandate was an essential jurisdictional prerequisite to the state court's authority to deprive the appellant of his liberty.

In the instant case, the appellant sought review by habeas corpus to determine whether the jurisdiction of the trial court below, under the Sixth Amendment, was constitutionally adjudicated in the collateral review under the Act. During the brief hearing on the appellant's petition for habeas corpus, the lower court indicated that it did not "think it [appellant's claim] can be properly heard under a habeas corpus proceeding." Transcript p.3, lines 7-9. However, the lower court failed to articulate this conclusion in the final order. Order p.1. Furthermore, the lower court made no findings as to whether the PCR court's actions in dismissing the appellant's Sixth Amendment right to counsel claims violated the Due Process Clause. In this state of the record, it should be appropriate to remand the cause.

The entire history of the writ of habeas corpus refutes any

construction of a court's habeas corpus powers that would assimilate its task to that of an appellate court. It has been well established that the scope of inquiry in a habeas corpus proceeding requires a more searching investigation into the legality of the grounds for a defendant's incarceration. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the gravest of allegations. What can be more grave than to allege that a state court, sworn to interpret the law, has completely ignored the law in resolving a constitutional issue, bound by law, relating to a trial court's jurisdiction to render judgment and impose sentence?

The appellant contended, during the PCR proceeding below, that he was convicted and sentenced without the effective assistance of counsel during the trial and plea process. Along with clear and convincing supporting evidence from the trial record, the appellant alleged that his trial counsel rendered constitutionally defective assistance by failing to secure, and protect, the opportunity for confrontation and cross-examination of an accomplice, whose presumptively unreliable confession was the basis for trial counsel's advice to accept the plea agreement in a purely circumstantial felony case. The appellant also alleged that counsel failed to advise him that witnesses could be cross-examined to impeach credibility, or to show bias or motivation in testifying; or, that an accomplice's confession that incriminates a defendant is presumptively unreliable, and must be subjected to the scrutiny of cross-examination. The appellant explained that, had he understood the mechanism of confrontation, he would have continued with trial and subject his ex-codefendant, who received

immunity in exchange for his testimony as a State witness, to the rigors of cross-examination. The appellant reasoned that, if the jury had been confronted with the considerable amount of impeachable evidence against his ex-codefendant that trial counsel was aware of at the time (e.g., prior inconsistent statement, charges dismissed in exchange for testimony, admitted treatment for drug abuse, evidence of crime of dishonesty, notice of alibi defense, and conviction for intent to distribute cocaine), the jury may have received a significantly different impression of the credibility of his ex-codefendant.

Trial counsel testified, during the PCR proceeding below, to a series of trial-related events that were clearly contradicted by the trial record itself. Counsel further testified that he did not explain to the appellant that a witness's motivation or bias in testifying could be exposed to the jury for the purpose of impeachment. Counsel ultimately testified that the credibility of the ex-codefendant was essential to the State's case; although, he [counsel] believed that the appellant would have been found guilty of all charges now that the ex-codefendant was going to testify. Subsequently, the PCR court dismissed the appellant's post-conviction application and ordered the State's attorney, as the prevailing party, to propose the final order.

The state PCR court below had a good faith obligation, under the Supremacy Clause, to comport with constitutional design in adjudicating the appellant's Sixth Amendment right to the effective assistance of counsel claims. Instead, the PCR court not only allowed the State's attorney, as the prevailing party, to draft the final order filed in the PCR proceeding below, it also

sanctioned the State attorney's novel standard - based solely on a credibility determination - for judging Sixth Amendment right to effective counsel claims; rather than relying on the two-prong performance and prejudice analysis mandated by the U. S. Supreme Court in Strickland. Cf. Cherry v. State, 386 S.E.2d 624 (1989), where the South Carolina Supreme Court stated that "Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel." See also Boan v. State, 388 S.C. 272, 275, 695 S.E.2d 850, 851 (2010). The final decision of the PCR court below provided no indicium of reliability that the constitutional mandate of the Sixth Amendment right to the effective assistance of counsel was complied with in the appellant's criminal proceeding.

The prejudice suffered by the appellant, as a result of the PCR court's actions, was fatal. Subsequent appellate reviews of the PCR court's final decision were meaningless and futile. The findings and conclusion, drafted by the prevailing party and contained in the PCR order, provided little or no assistance to the reviewing courts, under the deferential standard of review, in assessing the rationale of the conclusion reached by the deciding judge. Cf. Miranda v. Bennett, 322 F.3d 171, 177 (2nd Cir.2003), where that court stated that, "We view the 'potential for overreaching and exaggeration on the part of attorneys' frequently exhibited when they are preparing findings of fact after learning that the judge has decided in their favor." (quoting Anderson v. Bessemer City, 470 U.S. 564, 572, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)). Also see U.S. v. El Paso Natural Gas Co., 376 U.S. 651, 657 n. 4, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964) (citation omitted), where the U.S. Supreme Court explained:

District judges should avoid as far as they possible can simply signing what some lawyer puts under their noses. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case.

It necessarily follows that there exists no available remedial procedure, on the state level, to grant relief for a violation of procedural due process rights in the collateral appeal under the Act, unless the courts protect the appellant's rights by habeas corpus. Of the contention that habeas corpus laws provide no effective remedy for such a deprivation of rights affecting life or liberty would not only be contrary to the rudimentary demands of justice, but destructive of a constitutional guaranty specifically designed to prevent injustice.

A state court's unconstitutional validation of a trial court's jurisdiction, where life or liberty is at stake, justifies the issuance of a writ of habeas corpus. The record of the PCR court proceeding below is completely sufficient, without remand, to determine: 1) whether the PCR court's actions, in resolving the appellant's claims, violated the Due Process Clause of the Fourteenth Amendment; and, 2) whether the appellant met the burden of proof necessary to establish his claim of ineffective assistance of counsel at trial.

It was clearly open to the lower court, under its jurisdiction of habeas corpus, to look behind and beyond the record of, but not inconsistent with, the appellant's conviction to a sufficient extent to determine whether the jurisdiction of the trial court was unconstitutionally validated, under the Sixth Amendment, by the PCR court.

II. THE LOWER COURT ERRED IN MISCHARACTERIZING THE APPELLANT'S FOURTEENTH AMENDMENT DUE PROCESS CLAIM AS A MERE ADEQUACY OF PCR COUNSEL ALLEGATION, THEREBY, DIMINISHING THE IMPLICATION OF FUNDAMENTAL UNFAIRNESS.

Habeas corpus relief acts as the ultimate insurer of fundamental constitutional rights. Therefore, habeas corpus should be proper to re-examine the circumstances in which state procedures, under the Act, afforded the indigent appellant a liberty interest protected by the Due Process Clause of the Fourteenth Amendment, in the one and only constitutional challenge to his conviction.

"If a State has created appellate courts as an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." Evitts v. Lucey, 469 U.S. 387, 393 (1985).

The Due Process Clause assures that when a State provides an avenue or means to vindicate a constitutional right, the State must assure the indigent defendant an adequate opportunity to present his claim fairly within the context of the State's appellate process. See Ross v. Moffitt, 417 U.S. 600, 616 (1974).

In the instant case, the appellant sought the habeas corpus inquiry to determine whether nominal representation, by the state appointed attorney, in the only constitutional challenge to his conviction, violates the Due Process Clause. Petition p. I.

However, the lower court, in its prompt dismissal of the appellant's habeas petition, summarized this allegation as an

adequacy of PCR counsel claim, and concluded that it is not a subject matter for a writ of habeas corpus. Transcript p.2, lines 12-18. The lower court clearly disregarded the import of the Due Process Clause in the appellant's claim. Furthermore, the lower court failed to articulate this conclusion of the appellant's claim in the final order. Order p. 1.

To permit the indigent appellant to run the gantlet of a first-tier post-conviction appeal with respect to an ineffective-ness claim which was reviewed on the merits without the benefit of any organization or argument by appointed counsel constituted "a denial of fundamental fairness shocking to the universal sense of justice." The lower court's failure to consider the appointed lawyer's ineffectiveness during the first-tier collateral appeal would deprive the indigent appellant of an adequate opportunity for review of his Sixth Amendment ineffectiveness claims.

Under the State's "uniform jurisdiction" court structure, the circuit courts have appellate authority to conduct initial collateral appeals attacking the constitutionality of a criminal conviction. See S.C. Const. Art. V, § 11. Also see S.C. Code Ann. § 17-27-30. The purpose of the appellant's initial collateral review appears to be precisely to determine whether the appellant had been lawfully convicted. In seeking such an appellate review to the circuit court under the Act, in the absence of a direct review, the appellant had not had the benefit of a previously prepared trial transcript, a brief on the merits of the appeal, or a previous written opinion.

In applying the rationale of Evitts v. Lucey, supra, to the appellant's circumstances for the purpose of distinguishing an

appeal as of right, the appellant, in bringing a collateral appeal to the circuit court, had "not previously had an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Id.*, 469 U.S., at 402. Therefore, as an equitable matter, it follows that the collateral appeal of the appellant's ineffectiveness claims "for purposes of analysis under the Due Process Clause ... was an appeal as of right thus triggering the right to counsel recognized in Douglas v. California, 372 U.S. 353 (1963)." *Id.* It necessarily follows that the right to counsel "would be a futile gesture unless it comprehended the right to the effective assistance of counsel." *Id.*, at 397.

Although the State was not required to follow the mandate of Douglas, it nevertheless appointed counsel for the indigent appellant in accordance with its own procedural rules for collateral review under the Act. See Rule 71.1 (d), SCRCF. Under this procedural rule, appointed counsel "shall insure that all available grounds for relief are included in the application and shall amend the application if necessary." Unfortunately, the State provides neither a guaranty of counsel's compliance, nor a sanction against counsel's non-compliance with the relevant portion of Rule 71.1 (d), SCRCF. In addition, state procedures under the Act do not require representing attorneys to submit a brief on appeal to the circuit court.

There existed no evidence, prior to the appellant's PCR proceeding, that the state-appointed attorney reviewed the trial record or researched the legal issues related to a Sixth Amendment ineffectiveness claim. Appointed counsel made no attempt to amend the appellant's PCR application, nor did counsel prepare a brief

reflecting any review or research of the appellant's case. In addition, during the PCR proceeding below, counsel failed to marshal any legal arguments, on behalf of the appellant, with respect to the appellant's ineffectiveness claims. Under the circumstances of the appellant's post-conviction review below, the appellant was in no better position than a defendant who had no representation at all.

The appellant has also suffered drastic consequences as a result of the nominal representation he received in the initial post-conviction review of his Sixth Amendment claims. Without a prior brief prepared by the state-appointed attorney addressing his ineffectiveness claims in the PCR court, or a reasoned court opinion resulting from such a brief, the appellant's entitlement to subsequent appellate reviews were more formal than real.

Due process emphasizes a fundamental fairness between the State and the defendant. A habeas court should be alert to the realistic recognition of the obvious truth that a defendant, in a criminal appeal, does not have the professional legal skill to meet the adversarial presentation of the State's attorney. The assistance of an expert professional lawyer is necessary in a legal system governed by complex rules and procedures for any defendant to obtain a decision at all - much less a favorable decision - on the merits of the case.

Nominal representation in the PCR proceeding below was particularly egregious in that it essentially waived the appellant's opportunity to make a case on the merits. Cf. Martinez v. Ryan, 132 S. Ct. 1309 (2012), where the U. S. Supreme Court reasoned: "If the attorney appointed by the State to pursue the direct

appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims. Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy." Id., at 1317. "As an equitable matter, that a collateral proceeding, if undertaken with no counsel or ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim." Id., at 1318.

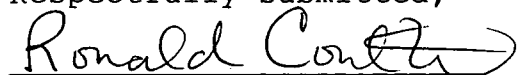
Where the State created a procedural right to an attorney in the initial post-conviction review under the Act, the habeas corpus inquiry should have been proper to examine whether the Due Process Clause tolerates nominal representation in such a first-tier collateral appeal challenging the validity of a conviction, for the first time, on the grounds of a violation of the Sixth Amendment right to the effective assistance of counsel.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

March 17, 2014

Respectfully submitted,



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