

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson
2010-CP-26-6653

SOMJAI FUNG FUE STARNES,..... 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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ISSUE PRESENTED

The PCR judge properly dismissed Petitioner's second PCR application where Petitioner failed to state a claim upon which relief could be granted.

STATEMENT OF THE CASE

Petitioner was indicted in June 1986 for criminal sexual conduct with a minor in the first degree (See App. p. 97). On August 26, 1986, Petitioner was tried before the Honorable C. Victor Pyle, Jr., and a jury. (See Supp. App. p. 104). Petitioner was convicted and sentenced to twenty (20) years. (See Supp. App. p. 104). A timely notice of appeal was filed, but the conviction was affirmed on December 8, 1987. (See Supp. App. p. 88).

On September 14, 1988, Petitioner submitted a PCR application. (See Supp. App. p. 77). The matter came before the Honorable James B. Stephen for an evidentiary hearing on January 30, 1990. (See Supp. App. p. 77). On April 5, 1990, Judge Stephen issued an Order finding that counsel was ineffective and granting a new trial. (Supp. App. p. 104-16). The State appealed. Initially, the South Carolina Supreme Court affirmed the decision of the PCR judge. (Supp. App. p. 102-103). The State filed a petition for rehearing. While the petition for rehearing was pending, Petitioner purported to enter a “no contest” plea to the lesser-included offense of lewd act upon a minor on October 24, 1991.¹ (Supp. App. p. 57-64). She was sentenced to ten (10) years suspended to time already served. (Supp. App. p. 96). Thereafter, the South Carolina Supreme Court granted the State’s petition for rehearing, and the Court reversed the post-conviction relief judge on December 2, 1991. (Supp. App. p. 92-95). Petitioner’s petition for rehearing was denied on March 24, 1992. (Supp. App. p. 66-67). In this same Order, the Court also declared that the plea court did not have jurisdiction to accept

¹ The Office of the Attorney General had no knowledge that this plea was occurring at the time. (See Supp. App. p. 78). It appears that none of the parties involved in the plea were aware that jurisdiction was still vested in the South Carolina Supreme Court pursuant to Rule 205, SCACR. (See Supp. App. p. 58; p. 78-79).

the lewd act plea while the PCR matter was still pending on appeal. (Supp. App. p. 66). However, the Court found that because the State allowed the Applicant to enter a “no contest” plea for time served, the State had illustrated its intent that the Applicant not be incarcerated further. (Supp. App. p. 66-67). Therefore, the Court vacated the plea but modified the Applicant’s sentence to thirty years satisfied upon time served. (Supp. App. p. 66-67). This concluded Petitioner’s first PCR appeal, and the matter was remitted to the circuit court.

On July 23, 2010, Petitioner filed a second Application for post-conviction relief. (App. p. 52-56). The State submitted a Return on August 21, 2010. (App. p. 49-51). Petitioner filed an Amended Application on January 25, 2011. (App. p. 45-48). The State submitted an Amended Return and Motion to Dismiss on the same day. (App. p. 41-44). An evidentiary hearing was held on February 1, 2011, before the Honorable Benjamin H. Culbertson. (App. p. 1-21). Judge Culbertson granted the State’s Motion to Dismiss, and, by Order dated March 1, 2011, denied and dismissed the Application. (App. p. 36-40). Petitioner’s Rule 59(e), SCRCP motion was denied by Order dated April 19, 2011. (App. p. 23). A timely notice of appeal was served and filed, and the Petition for Writ of Certiorari followed.

ARGUMENT

Overview

In her Amended PCR Application, Petitioner asserted that she received ineffective assistance of counsel, such that her lewd act with a minor plea was not informed and voluntary, since plea counsel failed to protect her from the jurisdictional issue that led to her plea being reversed, and since plea counsel failed to advise her that the charge to which she pled guilty would subject her to deportation. (App. p. 46). Petitioner asserted that she did not learn of this ineffective assistance of counsel until recently, such that her claim qualified as newly-discovered evidence. (See App. p. 4, lines 5-11; p. 46). In response, the State argued that, since the guilty plea was a nullity and was vacated by the South Carolina Supreme Court in 1992, any PCR claim based upon it must fail as a matter of law. (See App. p. 6; p. 11-12; p. 43).

At the PCR hearing, in response to the State's motion to dismiss, Petitioner argued that the plea was intended to be a contract between Petitioner and the State and had been intended to settle the matter pursuant to Rule 261(B), SCACR. (App. p. 3-4; p. 12-16). Petitioner contended that she relied upon this contract and that the State breached the contract. (App. p. 3-4; p. 13-15). Petitioner asserted that, since the plea was intended to prevent the possible reinstatement of the CSC with a minor charge, and since ineffective assistance of counsel caused the jurisdictional defect that led to the CSC's reinstatement, the only remedy was to vacate the original CSC conviction and grant the Applicant a new trial. (App. p. 3-5; p. 12-17). The PCR judge rejected Petitioner's arguments and dismissed the Application. (See App. p. 19-20; p. 39-40).

The PCR judge properly dismissed Petitioner's second PCR application where Petitioner failed to state a claim upon which relief could be granted.

The PCR judge properly denied relief. Since the guilty plea was vacated and does not exist in the eyes of the law, Petitioner's claims based upon it must fail. (See App. p. 19-20; p. 39). The lewd act plea was a nullity from the outset regardless of whether the State made a motion to vacate the plea. See Rule 205, SCACR; State v. Funderburk, 259 S.C. 256, 261, 191 S.E.2d 520, 522 (1972) (the acts of a court with respect to a matter as to which it has no jurisdiction are void); Ross v. Richland County, 270 S.C. 100, 103, 240 S.E.2d 649, 651 (1978) ("It is a universal principle as old as the law, that the proceedings of a Court without jurisdiction are a nullity, and its judgment without effect, either on the person or property."). Any erroneous legal advice, or lack of advice, regarding the effect of the plea was not prejudicial to Petitioner because the CSC with a minor conviction was subsequently reinstated and superceded the lewd act plea. Nothing that any of Petitioner's attorneys did or did not do with respect to the plea could have changed the fact that the South Carolina Supreme Court ultimately upheld Petitioner's CSC with a minor conviction. In that vein, regardless of whether Petitioner relied upon the lewd act plea, she would still be facing deportation just the same because of her CSC with a minor conviction. Since there is no basis for overturning the jury's verdict with respect to the CSC conviction – which has already been upheld on direct appeal and through the post-conviction relief process – there is no basis for granting Petitioner a new trial on this charge. Therefore, the PCR judge properly denied and dismissed Petitioner's Application.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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September 12, 2011

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM Horry COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson
2010-CP-26-6653

SOMJAI FUNG FUE STARNES,..... PETITIONER,

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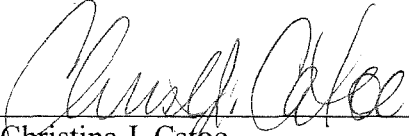
STATE OF SOUTH CAROLINA,.....RESPONDENT.

CERTIFICATE OF SERVICE

I hereby certify that I have served the **Return to Petition for Writ of Certiorari** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Rachel A. Dain, Esquire
Attorney Dain, LLC
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This 12th day of September, 2011.



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