

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Charleston County
Honorable Kristi L. Harrington, Circuit Court Judge **S.C. Supreme Court**

Lower Court Case No. 2010-CP-10-4462

Appellate Case No. 2013-000692

LARRY G. HARVIN,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
#100269

ATTORNEYS FOR RESPONDENT

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SC Court of Appeals

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S.C. Code Ann. Section 16-23-490(A) (2010).

STATEMENT OF ISSUES ON APPEAL

1. Whether the lower court properly denied the Appellant's Motion for Relief from Judgment pursuant to Rule 60(b), SCRCP and the lower court's order denying relief was sufficient?
2. Whether this Court should review the denial of the Appellant's State Petition for Writ of Habeas Corpus after the lower court's denial of relief was already reviewed once by this Court on appeal and a second review should be barred by the doctrine of *res judicata*?

STATEMENT OF THE CASE

This matter is before this Court by way of Appellant's appeal of the denial of his Motion for Relief from Judgment. The Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Appellant was indicted during the July 1997 term of the Charleston County Grand Jury for the murder of Bertha Joan Wilson (1997-GS-10-4288), armed robbery (1997-GS-10-4290) and possession of a weapon during the commission of a violent crime (1997-GS-10-4289). The Appellant was represented by D. Ashley Pennington and Sharon Crummey, Esquires. The Appellant proceeded to trial on October 12-16, 1998 and was found guilty. The Honorable Daniel F. Pieper sentenced the Appellant to life imprisonment for murder and thirty years for armed robbery¹.

The Appellant filed a Notice of Appeal. His appeal was perfected by Robert Dudek, Esquire. The South Carolina Supreme Court affirmed the Appellant's convictions and sentences on May 29, 2001. State v. Harvin, 345 S.C. 190, 547 S.E.2d 497 (2001). The Remittitur was issued on June 22, 2001.

The Appellant filed his first application for post-conviction relief on August 9, 2001 (2001-CP-10-2971). The Respondent filed its Return on February 1, 2002. After a full evidentiary hearing, the Honorable Victor Rawl dismissed and denied the Appellant's application by Order filed October 29, 2002. The Appellant subsequently filed a Motion to Alter and Amend which was denied by the Court on May 23, 2009.

The Appellant filed a Petition for Writ of Habeas Corpus in the United States District Court. The Respondent filed a Return and Motion for Summary Judgment on May 21, 2003. On

¹ Pursuant to S.C. Code Ann. Section 16-23-490(A) (2010), Judge Pieper did not sentence the Appellant on the possession of a weapon during the commission of a violent crime charge.

October 6, 2003, the Honorable Joseph McCrorey filed a Magistrate's Report and Recommendation. By Order filed January 16, 2004, the Honorable G. Ross Anderson, Jr. granted the Respondent's Motion for Summary Judgment and dismissed the Appellant's petition. The Appellant subsequently appealed to the Fourth Circuit Court of Appeals. This appeal was dismissed on August 10, 2004. The Appellant also filed a Motion to Vacate and a Motion for Relief from Judgment in the United States District Court which were both dismissed on January 11, 2007 and September 13, 2011, respectively.

The Appellant filed his second application for post-conviction relief on March 3, 2010 (2010-CP-10-1709). The Respondent filed a Return and Motion to Dismiss dated June 24, 2010. The Honorable R. Markley Dennis signed a Conditional Order of Dismissal which was filed on July 6, 2010. The Appellant's second application was dismissed by Final Order which was filed on November 12, 2010.

The Appellant subsequently filed a Petition for Writ of Habeas Corpus (2010-CP-10-4462) in the circuit court on June 1, 2010. The Respondent filed a Return and Motion to Dismiss dated October 20, 2011. The Honorable Kristi L. Harrington signed a Conditional Order of Dismissal which was filed on December 8, 2011. The petition was dismissed by Final Order on December 16, 2011.

The Appellant then filed a second Motion for Relief from Judgment in the United States District Court. The appeal was dismissed and certificate of appealability was denied on February 28, 2012.

The Appellant filed a Notice of Appeal challenging the denial of his State Petition for Writ of Habeas Corpus. The Appellant filed a Petition for Rehearing which was denied by this Court on April 9, 2012. The Court denied the Appellant's Petition for Rehearing on July 20,

2012. A Remittitur was issued on August 20, 2012, but later recalled. The South Carolina Supreme Court denied the Appellant's Petition for Writ of Certiorari on August 21, 2012. The Remittitur was issued on October 9, 2012.

The Appellant then filed a Motion for Relief from Judgment pursuant to Rule 60(b), SCACR in the circuit court dated January 31, 2013 challenging the denial of his state habeas petition. The Honorable Kristi L. Harrington denied the Appellant's motion by Order filed February 28, 2013. This appeal follows.

ARGUMENT

This matter is before this Court by way of an appeal of the lower court's denial of the Appellant's Motion for Relief from Judgment pursuant to Rule 60(b), SCRCP. In his Motion for Relief from Judgment, the Appellant challenged the lower court's denial of his state habeas petition and asked the lower court to vacate the conditional and final orders of dismissal and grant him an evidentiary hearing. The Appellant alleged the conditional and final orders of dismissal were void because they did not give clear notice of a change in law requiring non-PCR allegations to be raised in a PCR action and they were not consistent with due process. By Order dated February 22, 2013 and filed February 28, 2013, the Honorable Kristi L. Harrington denied the Appellant's motion. The Order stated "[u]pon review of the Motion for Relief from Judgment, the Applicant's Memorandum in Support, as well as the original pleadings and the records attached thereto, the Applicant's Motion for Relief from Judgment is respectfully DENIED." (Habeas Order p.1).

On appeal, the Appellant alleges the lower court committed an abuse of discretion by failing to state findings of fact and conclusions of law in its Order denying his Rule 60(b), SCACP motion. The Respondent submits this allegation is without merit and the lower court did not abuse its discretion by denying the Appellant's Rule 60(b), SCRCP motion.

Rule 60(b), SCRCP states as follows:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based had been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."

A party seeking to set aside a judgment has the burden of presenting evidence entitling him to the requested relief. Auto-Owners Ins. Co. v. Rhodes 385 S.C. 83, 682 S.E.2d 857 (S.C. App. 2009) rehearing denied, affirmed in part, reversed in part 748 S.E.2d 781. Whether to grant or deny a motion to set aside a judgment is within the sound discretion of the trial court. Id. A party may not invoke rule for relief from judgment where it could have pursued the issue on appeal. Tench v. South Carolina Dept. of Educ. 347 S.C. 117, 553 S.E.2d 451 (2001). Relief from judgment should not be considered a substitute for appeal from final judgment, particularly when it is clear the party seeking relief could have litigated at trial and on appeal claims he now makes by motion. Smith Companies of Greenville, Inc. v. Hayes 311 S.C. 358, 428 S.E.2d 900 (S.C. App. 1993).

The lower court properly denied the Appellant's Motion for Relief from Judgment and the Order denying the motion was sufficient when the claims raised in the motion could have been and were litigated on appeal and the Order denying the motion did not have to include findings of fact and conclusions of law.

First, the Respondent submits denial of the Appellant's motion for relief from judgment was proper because the allegations made in the Appellant's motion could have been and were litigated on appeal. The Appellant on appeal from the lower court's denial of his state habeas petition alleged in his written explanation pursuant to Rule 203(d)(1)(B)(vi), SCACR that the lower court's denial of his habeas petition was improper because the issues raised in his habeas petition could not have been raised in a post-conviction relief application as the lower court claimed. (App. Written Explanation p. 2). After review of the Appellant's written explanation, this Court dismissed the appeal finding the Appellant's explanation did not "contain sufficient facts, argument, and citation to legal authority to show that there is an arguable basis for asserting the determination by the lower court was improper." (Court of Appeals Order filed April 9, 2012).

In the Motion for Relief from Judgment challenging the denial of Appellant's state habeas petition, the Appellant made the exact same argument to the lower court that he made to this Court on appeal from the denial of the Appellant's habeas petition. On both appeal and in the Appellant's Motion for Relief from Judgment, the Appellant challenged the lower court's ruling that the issues raised in the Appellant's state habeas petition are non-PCR allegations and could not be raised in a PCR action. Because a motion for relief from judgment is not a substitute for appeal and it is clear in the motion the Appellant was trying to litigate a claim this Court had already reviewed on appeal, the lower court's dismissal of the Appellant's motion was proper.

Second, the Respondent submits the lower court's Order denying the Appellant's motion was sufficient. Pursuant to Rule 52(a), SCRCP, "findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b) (emphasis added)." Based on Rule 52(a), unless a party's motion is made pursuant to Rule 41(b), the court's decision does not have to include findings of fact and conclusions are law. The Appellant's Motion for Relief from Judgment was based on Rule 60(b), SCRCP and made no reference to Rule 41(b)², therefore, the lower court did not have to include findings of fact and conclusions of law in its order denying the Appellant's motion.

The Respondent also submits the language in the lower court's Order denying the Appellant's motion was sufficient. The Order stated the case's procedural history and the type of relief the Appellant was requesting from the court. The Order also noted the documents reviewed by the court prior to its ruling. (Order Denying Appellant's 60(b) Motion). Finally, the Order concluded "the Applicant's Motion for Relief from Judgment is respectfully DENIED." The

² Rule 41(b), SCRCP describes a motion filed by the defendant for dismissal of an action or claim against him based on the "failure of the plaintiff to prosecute or comply with these rules or any order of court".

Respondent submits the lower court did not abuse its discretion by denying the Appellant's Motion for Relief from Judgment and the lower court's Order denying the motion was sufficient.

This Court should not review the denial of the Appellant's state habeas petition when this Court already reviewed the lower court's denial of relief on appeal and a second review of the lower court's denial should be barred by the doctrine of *res judicata*.

The Appellant claims this Court should address the issue of whether or not the lower court committed an abuse of discretion by denying the Appellant's state habeas petition. The Respondent submits this issue is not properly before this court in the Appellant's appeal of the denial of his Rule 60(b), SCRPC motion. The Respondent also submits this Court has already reviewed the lower court's denial of the Appellant's state habeas petition and the doctrine of *res judicata* should bar the Appellant from having this Court review the issue a second time.

First, the denial of the Appellant's habeas petition has already been reviewed by this Court on appeal. After the lower court denied the Appellant's petition for habeas corpus, the Appellant filed a Notice of Appeal with this Court which was filed on January 17, 2012. (Notice of Appeal from Denial of Appellant's Habeas Petition p. 1). The Appellant also filed with his Notice of Appeal a Written Explanation of Improper Determination. (App. Written Explanation). By Order filed April 9, 2012, this Court, after review of the Appellant's Written Explanation, dismissed the Appellant's appeal. (Court of Appeals Order filed April 9, 2012). The Remittitur was issued on August 21, 2012, then recalled by Order filed August 24, 2012. (Remittitur Issued August 21, 2012, Order Filed August 24, 2012). The Court then denied the Appellant's Petition for Rehearing by Order filed July 20, 2012. (Order Filed July 20, 2012). The Appellant filed a Petition for Writ of Certiorari in the South Carolina Supreme Court which was denied on September 21, 2012. The Remittitur was issued on October 9, 2012. It is clear from the prior proceedings of this Court that the Appellant has already challenged the denial of his state habeas

petition in this Court and this Court dismissed his appeal after review of the Appellant's written explanation.

Second, since the Appellant has already challenged the denial of his state habeas petition once, he should be barred from challenging the denial of relief a second time by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id. To establish *res judicata*, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Riedman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992); Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986).

In both the Appellant's appeal of his state habeas petition and this current appeal of the denial of the Appellant's Motion for Relief from Judgment, the parties are the Appellant and the State of South Carolina. In both the Appellant's prior appeal and this current appeal, the subject matter of the proceeding was the lower court's denial of the Appellant's state habeas petition. Lastly, the Appellant's appeal from his state habeas was dismissed by this court after review of the Appellant's written explanation and the Remittitur was issued. The Respondent submits this Court should not review the denial of the Appellant's state habeas petition and find a second review of this issue is barred by the doctrine of *res judicata*.

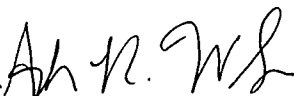
CONCLUSION

For all the foregoing reasons, the Respondent respectfully asks this Court to affirm the lower court's judgment.

Respectfully submitted,

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

BY: 

Ashleigh R. Wilson

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

March 28, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
)
LARRY G. HARVIN , #253468)
)
Applicant,)
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vs)
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)
_____)

IN THE SOUTH CAROLINA COURT OF APPEALS

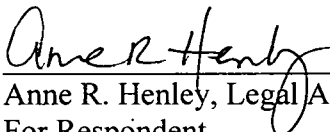
2012-CP-10-2988

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Initial Brief of Respondent and original Designation of Matter** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Larry G. Harvin, #253468
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

DATED this 28th day of March, 2014



Anne R. Henley, Legal Assistant
For Respondent

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