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The State of South Carolina

Supreme Court

S.C. Supreme Court

APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS – Sixteenth Judicial Circuit

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Devon Miles Brown,

Applicant,

v.

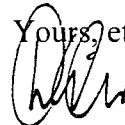
2012-CP-46-3762

State of South Carolina,

Respondent.

RULE 243 (c), SCACR Explanation of Why the Common Pleas Court's
Determination that Brown's Claim that his Trial Counsel Rendered Ineffective
Assistance of Counsel When He Failed to Litigate the Sentencing Hearing
Competently and Permitted Invalid Convictions to Enhance his Sentence is Barred as
Untimely under the Statute of Limitations is Improper

Yours, etc.,



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Attorney for Devon Miles Brown

1. DALE LIONEL SMITH, ESQ., an attorney admitted *pro hac vice* to practice law before this Honorable Court, on behalf of Post Conviction Relief (“PCR”) Applicant, Devon Miles Brown, hereby submits an explanation of why the Common Pleas Court’s determination that one of the ineffective assistance of counsel claim is barred by the statute of limitations is improper pursuant to Rule 243 (c), SCACR.

2. On January 29, 2014, the undersigned counsel received in his office the Judgment and Order of Dismissal (Exhibit A) of Brown’s PCR Application. Brown’s application in Item 1 alleged his trial counsel rendered ineffective assistance of counsel when, (1) counsel failed to inform him that he would receive a mandatory 25-year sentence if he proceeded to trial, which caused him to reject a 5-year plea offer, (2) counsel failed to investigate his criminal history, failed to obtain a transcript of the guilty pleas of the two prior convictions used to enhance his sentence and failed to object to the use of the constitutionally invalid convictions to enhance his sentence to 25 years. In other words, the claim made in this latter part is that trial counsel failed to litigate the sentencing hearing competently and as a result Brown was prejudiced when the court imposed a mandatory 25-year sentence and thus violated his 6th and 14th Amendments right to effective assistance of counsel.

3. The common pleas court is mistaken in its assertion in the Order of Dismissal that “[a]t the hearing, Applicant proceeded only on his claim of ineffective assistance of trial counsel for not properly advising him concerning the plea offer from the State under *Lafler v. Cooper* and its determination that the ineffective assistance of counsel claim regarding trial counsel’s failure to competently conduct

the sentencing hearing was time-barred. *See* Order of Dismissal at 4, 12 n2. It is clear from the examination of the State's witness Mr. David Cook, as well as the introduction of the guilty plea transcript of the prior convictions, and arguments made at the hearing that Brown pursued his claim that trial counsel rendered ineffective assistance of counsel when he failed to investigate and failed to object to the constitutionally invalid convictions used to enhance his sentence.

4. Indeed, because the plea transcripts of the prior convictions, which were admitted into evidence at the PCR hearing, demonstrated that the convictions were invalid in that the pleas were not knowing, intelligent, and voluntary [*see e.g. Boykin v. Alabama*, 395 U.S. 238 (1969)], the lower court should have found that trial counsel rendered ineffective assistance of counsel and that Brown is entitled to relief on his claim. *See e.g. Hanson v. Phillips*, 442 F.3d 789 (2d Cir. 2006) (prior convictions which violate *Boykin* cannot be used to enhance sentence).

5. Nor is the application as it pertains to the issue of trial counsel's failure to litigate the sentencing hearing competently untimely. The Court of Appeals initial notice of decision to counsel in New York mistakenly contained a decision and order unrelated to Brown's case, which caused some of the delay in seeking a rehearing in the Court of Appeals. Shortly after the Remittitur was issued, Brown attempted to file a Petition for Rehearing when he filed a Motion to Recall the Remittitur, to Reinstate Appeal, and to Enlarge the Time to File Petition for Rehearing. After, the Court of Appeals on August 30, 2011 returned the motion without formally ruling on it, Brown filed a Petition for Certiorari with the Supreme Court within the 30-day deadline from the August 30th date. The Supreme Court

dismissed his Petition for a Writ of Certiorari to the Court of Appeals on October 25, 2011, and it is Brown's contention that the Supreme Court's decision and its October 25, 2011, date constitutes "*the filing of the final decision upon an appeal*" [S.C. Code Ann. §17-27-45 (A)] and represents the beginning of the one-year limitations period. As a result, Brown's PCR Application was filed within the one-year deadline since he filed it either on October 22, 2012 or October 24, 2012, which are both within the one-year limitations period. Accordingly, the lower court is wrong in its determination that the one-year limitations period began on June 23, 2011, when the Court of Appeals issued the Remittitur.

6. Even if the lower court was correct in its determination that the June 23, 2011 date represents the start of the limitations period, the doctrine of equitable tolling applies in this case because Brown pursued his rights diligently and the extraordinary circumstance described above stood in his way. In the circumstances of this case, where arguably the motion may be deemed untimely as a result of mistake, error, excusable neglect, or even negligence, the reasoning of this Court's decisions in *Austin v. State*, 305 S.C. 453 (1991), *Odom v. State*, 337 S.C. 256 (1999), and *Wilson v. State*, 348 S.C. 215 (2002), requires that the one-year limitations period not apply to Brown. A ruling on the merits regarding trial counsel's failure to litigate the sentencing hearing competently would prevent an unjust procedural defect and permit Brown to have his "right to one fair bite at the apple", *Wilson v. State*, 348 S.C. 215, 218, *i.e.* a full and fair PCR hearing on the merits.

7. Moreover, because the United States Supreme Court recently granted a procedural right to people like Brown to have an initial review of an ineffective

assistance of counsel claim heard on the merits in the federal courts, even when the claim has been procedurally defaulted in the state courts. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the lower court should have ruled on the merits of the ineffective assistance of counsel claim that trial counsel failed to litigate the sentencing hearing competently in the first instance since it observed first-hand the testimony of the witnesses and was in the best position to make critical credibility determinations, and thus, making it more likely to lead to an accurate and reliable determination in a proceeding seeking to vindicate important constitutional rights.

Dated: February 27, 2014

Respectfully submitted,



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