

STATE OF SOUTH CAROLINA

In the Supreme Court

Appeal from Sumter County
Court of Common Pleas

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. : 2014-001159

Lavar P. Sanders Petitioner,

vs.

State of South Carolina Respondent.

EXPLANATION

Lavar P. Sanders #259354
Lieber Corr. Inst.
P.O. Box 205
Ridgeville, SC 29472

PRO SE PETITIONER

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JUN 17 2014

S.C. SUPREME COURT

STATEMENT OF FACTS

Petitioner was indicted in Sumter County for Unlawful Drugs with specific counts of Trafficking in Cocaine, Possession of Cocaine with Intent to Distribute Within Proximity of a Public Park, Possession of Marijuana with Intent to Distribute (2006-65-43-1054). Arthur Wilder, Esquire, represented him. On March 5, 2009, the Petitioner was convicted by a jury of Possession with Intent to Distribute Cocaine within one half mile of park and Trafficking Cocaine ten grams or more but less than twenty-eight grams. The Honorable R. Ferrell Cothran, Jr. sentenced Petitioner to twenty-five years imprisonment for Trafficking Cocaine and eight years imprisonment for PWID Cocaine within one half mile of park, with the sentences to run concurrently.

A timely notice of appeal was filed. The South Carolina Court of Appeals Dismissed the appeal. State v. Sanders, Op. No. : 2011-UP-217 (S.C. Ct. App. filed May 17, 2011). The Remittitor was sent on June 2, 2011.

Petitioner filed a timely post-conviction relief application (2012-CP-43-180) on January 30, 2012. In his post-conviction relief application, Petitioner alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel

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a. Failure to Investigate

2. Denial of Due Process

Respondent made its Return on June 4, 2012. An evidentiary hearing was convened into the matter on March 18, 2013 at the Sumter County Courthouse. The Petitioner was present at the hearing and was represented by Charles T. Brooks, III, Esquire. The Respondent was represented by Megan E. Harrigan of the South Carolina Attorney General's Office. By order dated April 11, 2013, and filed April 17, 2013, Judge Young denied and dismissed the application with prejudice. A timely notice of appeal was filed on April 22, 2013. The Appeal is still currently pending.

Petitioner filed a second application for post-conviction relief on July 11, 2013 and alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
2. Ineffective Assistance of PCR Counsel
3. Violation of Due Process
 - a. " 6th and 14th Amendment violation "

Respondent made its Return on October 17, 2013, requesting the application be summarily dismissed based upon statute of

limitations, successiveness, and *res judicata*. The Honorable George C. James, Jr. issued a Conditional Order of Dismissal on October 25, 2013, provisionally denying and dismissing the action, while giving the Petitioner twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Petitioner filed his Response In Opposition on November 6, 2013, arguing that he was prevented from raising new grounds for relief in his previous application or at the hearing because he did not have possession of his transcript, the application is not barred by the statute of limitations because pursuant to the discovery rule, Petitioner filed the Application within one year of him discovering the new grounds for relief found in the transcript, and he is not barred by the doctrine of *res judicata* because he is raising new allegations of ineffective assistance of counsel that was not raised in the original application or at the hearing. The Honorable B. Ferrell Cothran, Jr. issued a Final Order of Dismissal on May 13, 2014, finding that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final, Petitioner's claim that his new allegations of ineffective assistance amounts to newly discovered evidence is without merit, Petitioner's allegation is barred by the doctrine of *res judicata*, and Petitioner's action was filed outside the expiration of the statute of limitations. A timely notice of appeal was filed on May 28, 2014.

This Appeal follows.

ARGUMENTS

I. The PCR judge committed an error of law in finding that Petitioner's claim of newly discovered evidence is without merit when Petitioner did not raise a claim of newly discovered evidence .

In Petitioner's Response in Opposition to the Conditional Order of Dismissal, Petitioner argued that pursuant to S.C. Code Ann. § 17-27-45 (c)¹ his claims falls under the discovery rule and therefore, is not barred by the statute of limitations.

However, in the PCR judge's Final Order of Dismissal, the judge misconstrued Petitioner's argument into a newly discovered evidence. This is an error of law. Petitioner never argued that he had newly discovered evidence in this case but, only argued that his new claims of ineffective assistance of counsel should not be dismissed as time-barred because they fall under the **discovery rule** of S.C. Code § 17-27-45 (c).

1.

S.C. Code Ann. § 17-27-45 (c) states :

" If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of conviction or sentence, the application must be filed under this chapter within one year of the date of the actual

Reviewing court will uphold findings of the post-conviction relief court when there is any evidence of probative value to support them, and will reverse the decision of the post-conviction relief court when it is controlled by error of law. Walker v. State, --- S.E.2d---, 2014 WL 1052609 (S.C.)

The PCR Court's findings in this case are controlled by an error of law this Court must reverse the decision.

discovery of the facts by the applicant or the date when the facts could have been ascertained by the exercise of reasonable diligence "

II. The PCR judge erred in finding that Petitioner's claims of ineffective assistance of counsel are barred by the doctrine of res judicata.

Despite Petitioner's argument that he is not raising the same claims raised in his original application but new claims recently discovered that could not have been raised in the original application or at the PCR hearing due to the missing transcript, the PCR judge found that Petitioner's claims of ineffective assistance of counsel are barred 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.

At Petitioner's first PCR hearing, he moved for a continuance in order to obtain the transcript of his trial. The PCR court denied Petitioner's request and proceeded on the merits of his claims. Petitioner only raised one issue of ineffective assistance of counsel for failing to investigate. This was the only claim that Petitioner was aware of at the time

that was outside of the record. The PCR court denied Petitioner's application and dismissed it with prejudice. On appeal from the denial of PCR, the Petitioner received a copy of the transcript from appointed counsel and discovered new claims of ineffective assistance of counsel inside of the record that was not and could have been raised in his original application or at the hearing and brought forth this subsequent action.

III. The PCR court committed a reversible error in allowing the judge who presided at Petitioner's trial to preside over Petitioner's postconviction proceeding.

In Floyd v. State, 303 S.C. 298, 400 S.E.2d 145 (1991) this Court held :

" Judge who presided at petitioner's trial may not preside over subsequent post-conviction proceeding "

In the present case, it is undisputed that the Honorable R. Ferrell Cothran, Jr. presided over Petitioner's jury and now presides over his postconviction proceeding. This is a reversible error as the language in Floyd is clear that the same judge who presides over a petitioner's trial **may not** preside over subsequent postconviction proceeding.

IV. Trial Counsel was ineffective for failing to motion for a speedy trial.

Out of the abundance of caution, Petitioner presents this specific claim of ineffective assistance of counsel to the Court although it was not specify in the PCR application that Petitioner may reserve his right to federal review. Petitioner submits that this is the claim he intended to raise had an evidentiary hearing been granted on his second PCR application.

Petitioner asserts that trial counsel was ineffective for failing to motion for a speedy trial. At the commencement of Petitioner's trial, counsel move to dismiss Petitioner's charges on the ground that the solicitor failed to prosecute the case in a timely manner although it had Petitioner's case on the trial docket for three (3) years. Counsel argued vigorously for the case to be dismiss because of the inordinate delay and the solicitor's failure to give a justifiable reason for the delay. The trial judge asked counsel " did you file a motion for a speedy trial ". Counsel said " no ". The judge denied counsel's request to dismiss the charges.

Every person accused of a crime is entitled to a speedy trial under Article I, Section 18 of the Constitution of South Carolina and the Sixth and Fourteenth Amendments to the Constitution of the United States. Klopfer v. North Carolina,

386 U.S. 213, 87 S.Ct. 988, 18 L.Ed. 2d 1 (1967). This is a relative right which admits of delays and depends upon circumstances. Beavers v. Haubert, 198 U.S. 77, 25 S.Ct. 573, 49 L.Ed. 950 (1905). 'Whether or not a person accused of crime has denied his constitutional right to a speedy trial is a question to be answered in the light of the circumstances of each case. A speedy trial does not mean an immediate one; . . . it simply means a trial without unreasonable and unnecessary delay.' Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966).

In Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972), the Court, speaking through Mr. Justice Powell, recognized that such cases must be approached on an Ad hoc basis and suggested four factors which courts should assess in determining whether a defendant has been deprived of this right, to wit: 'Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.' 407 U.S. at 530, 92 S.Ct. at 2192. The South Carolina Supreme Court has recognized these factors. See, State v. Foster, 260 S.C. 511, 197 S.E.2d 280 (1973).


It is clear that had counsel filed a speedy trial motion then he would have had basis for his argument. State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978) (Two-year and four-month delay between arrest and preliminary hearing was not alone dispositive of speedy trial claim; however, delay

was sufficient to trigger review of three remaining factors specified by Supreme Court to be weighed in resolving speedy trial issues as well as consideration of such other circumstances as might be relevant.). Had counsel filed the motion, it is a reasonable probability that the judge would have dismissed Petitioner's case ; the solicitor failed to give a justifiable reason as to the delay (three (3)- years) and Petitioner was prejudice by the dalay because he lost valueable witnesses in his defense .

CONCLUSION

Based upon the foregoing, the PCR court's decision in dismissing Petitioner's Application for Post-Conviction Relief without an evidentiary hearing was improper and Petitioner's convictions and sentences should be reversed and/or this case remand to the lower court with instructions to hold an evidentiary hearing on Petitioner's second application.

Respectfully Submitted,



Lavar P. Sanders #259354

Lieber Corr. Inst.

P.O. Box 205

Ridgeville, SC 29472

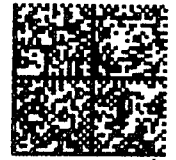
June 12, 2014
Ridgeville, SC

Kavar P. Sanders # 159254
Lieber
P.O. Box 205
Ridgeville, SC 29472



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