

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County
John C. Hayes, III, Circuit Court Judge

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JUN 18 2014

S.C. Supreme Court

JIMMY CHARLES KENDALL, III,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-001800

REPLY TO THE RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Petitioner Jimmy Charles Kendall, III appealed the PCR court's order summarily denying and dismissing his PCR application with prejudice, arguing that the PCR court erred in ruling the allegation raised by Petitioner in his PCR proceeding – specifically that he did not knowingly and intelligently waive his Sixth Amendment right to counsel – was a direct appeal issue that was procedurally barred by S.C. CODE ANN. § 17-27-20(B).

Inexplicably, the State now argues that Petitioner's issue on appeal is not preserved for this Court's review even though Petitioner has appealed the very ruling made by the PCR court in its Order of Dismissal. The issue Petitioner raises in this PCR appeal to this Court was clearly raised to and ruled upon by the PCR court and is unquestionably preserved for this Court's review.

Petitioner entered a *pro se* guilty plea to murder. App. 1-37. After filing his PCR application, alleging in part that he did not have the representation of an attorney, the State filed a Motion to Dismiss the PCR application for failing to state a claim cognizable under the Post-Conviction Procedure Act. App. 38-51.

The PCR court issued a Conditional Order of Dismissal, indicating that Petitioner's application should be summarily dismissed for failure to state a claim under the Post-Conviction Procedure Act and that the PCR court intended to “dismiss the Application with prejudice unless the [Petitioner] provide[d] specific reasons, factual or legal, why the Application should not be dismissed in its entirety.” App. 52-55.

Petitioner responded to this Conditional Order, asserting that this order be vacated and that Petitioner be granted a full evidentiary hearing on whether he validly waived his

right to counsel before entering a *pro se* guilty plea pursuant to Faretta v. California, 422 U.S. 806 (1975). App. 63-67.

The PCR court then issued its Final Order of Dismissal, specifically ruling:

In a document titled “Applicant’s Response to Conditional Order of Dismissal,” the [Petitioner] argues he is entitled to an evidentiary hearing because he contends his waiver of counsel at the November 2, 2011 hearing was not knowingly and intelligently made. The [Petitioner] further argues the trial court should have conducted a hearing pursuant to Faretta v. California, 422 U.S. 806 (1975) to determine whether the [Petitioner] knew and understood the dangers of self-representation. This Court had reviewed the [Petitioner’s] response to the State’s motion to dismiss in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

This allegation raises a direct appeal issue that is procedurally barred by S.C. CODE ANN. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The [Petitioner] could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Once the [Petitioner] decides to represent himself, there cease to exist a claim for ineffective assistance of counsel. Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

App. 68-69.

The PCR court therefore ruled that whether Petitioner knowingly and intelligently waived his right to counsel was not an issue he could raise on post-conviction relief and that Petitioner could have only raised this issue at trial or on direct appeal. Id.

This is the very ruling that Petitioner is appealing to this Court. Petitioner has asserted in his Petition for Writ of Certiorari that the PCR court’s ruling was incorrect where Petitioner’s assertion that he did not knowingly and intelligently waive his Sixth Amendment right to counsel is expressly permitted under the Post-Conviction Procedure

Act which permits any person who claims his “conviction of sentence was in violation of the Constitution of the United States” to institute a proceeding. Petitioner is not raising in this appeal anything that was not ruled upon and not included in the PCR court’s Order of Dismissal.

The PCR court’s dismissal of Petitioner’s PCR application was erroneous where Petitioner’s allegation was not procedurally barred by S.C. CODE ANN. § 17-27-20(B) and is expressly permitted by the Act. In his Petition, Petitioner pointed this Court to the numerous cases which have permitted a claim of post-conviction relief where a defendant has asserted that he did not knowingly and intelligently waive the right to counsel. See Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002); Watts v. State, 347 S.C. 399, 556 S.E.2d 368 (2001); Stevenson v. State, 337 S.C. 23, 522 S.E.2d 343 (1999); Salley v. State, 306 S.C. 213, 410 S.E.2d 921 (1991); Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (1990); Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990); see also Bridwell v. State, 306 S.C. 518, 413 S.E.2d 30 (1992).

Petitioner has been wrongfully denied his right to an evidentiary hearing for a determination of whether he is entitled to post-conviction relief and whether he made a knowing and intelligent waiver of the right to counsel. Therefore, Petitioner requests this Court to find the issue preserved, reverse the PCR court’s denial and dismissal of Petitioner’s PCR application, and remand for an evidentiary hearing.

CONCLUSION

For the reasons set forth herein and in the Petition for Writ of Certiorari, Petitioner Jimmy Charles Kendall, III requests that his Petition for Writ of Certiorari be granted with the ultimate relief of a reversal of the PCR court's dismissal of his PCR application on the grounds that it was procedurally barred by S.C. Code Ann. § 17-27-20(B). The case should then be remanded for a full evidentiary hearing on whether Petitioner is entitled to post-conviction relief.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of June, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

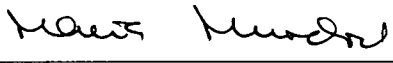
I certify that a true copy of the Reply to the Return to Petition for Writ of Certiorari in this case has been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Jimmy Charles Kendall, III, #319409, Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 18th day of June, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 18th day
of June, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.