STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Greenville County

Letitia H. Verdin, Circuit Court Judge

ORLANDO SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213673

BRIEF OF PETITIONER

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STATEMENT OF THE ISSUE ON APPEAL

Did the lower court err in applying the seven-year time limit found in section 17–28–30(B) of the South Carolina Code, which applies to individuals who pled guilty or no contest by its clear and unambiguous language, to Orlando Smith's application for post-conviction DNA testing where Smith pled not guilty requiring application of section 17–28–30(A) of the South Carolina Code, which has no time limit?[1]

[1] Respondent presented four "counter questions presented" in its Return to Petition for Writ of Certiorari in Support of Certiorari. Return at iv In light of the fact that this Court's order granted the petition for writ of certiorari and only one petition was filed – Petitioner's – Petitioner interprets this Court's order as granting the writ as to the question presented in Petitioner's petition for writ of certiorari. Additionally, the four "counter questions presented" are subsumed in Petitioner's single issue presented. The issue before this Court concerns statutory interpretation of the statute of limitations contained within Section 17-28-30.

STATEMENT OF THE CASE

On July 15, 2000, Orlando Smith was tried before the Honorable Larry R. Patterson and a jury on the charge of murder. G. David Seay represented the state, and C. Timothy Sullivan represented Smith. App. 1. On July 19, 2000, the jury found Smith guilty as charged. App. 313, lines 21 – 23. Judge Patterson sentenced Smith to thirty years' imprisonment. App. 321, lines 5 – 7. Smith filed a direct appeal challenging his conviction. Joseph L. Savitz, III, represented Smith by filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). This Court dismissed his appeal on May 23, 2002 in an unpublished opinion. App. 323 – 324; State v. Smith, Op. No. 2002-UP-372 (S.C. Ct. App. filed May 23, 2002).

On September 17, 2002, Smith filed an application for post-conviction relief (PCR). This action was assigned case number 2002–CP–23–6327. App. 325 – 331. Additionally, Smith filed a motion to compel production of evidence for scientific testing. App. 335 – 336. An order to compel production was signed on October 24, 2003 and filed on October 31, 2003. App. 337 – 338. The matter proceeded to a hearing on October 22, 2003 before the Honorable Edward W. Miller. John A. O'Leary represented Smith, and Christopher L. Newton represented the state. App. 339. After the hearing, Smith submitted a memorandum in support of PCR with accompanying affidavits. App. 410 – 431. By order filed on March 31, 2004, Judge Miller denied Smith relief App. 432 – 437. Smith filed a motion to alter or amend pursuant to Rule 59(e), SCRCP. App. 438 – 440. By order filed June 15, 2004, Judge Miller denied the motion. App. 441. Smith filed a petition for writ of certiorari following the denial of his PCR application. His appellate counsel filed a petition pursuant to Johnson v. State, 294 S C. 310, 364 S.E.2d 201 (1988). The matter was referred to this Court. On June 12, 2006, this Court denied the petition. App. 442 – 443.

On February 17, 2009, Smith wrote to the local clerk of court requesting an application form for the "Post-Conviction DNA Procedures Act." App. 444. On March 19, 2009, South Carolina Court Administration sent Smith a letter advising him that the forms were unavailable at that time and would be made available at a later date. App. 445.

On December 16, 2009, Smith completed and submitted an application for forensic DNA testing to the Clerk of Court for Greenville County. App. 448 – 452. In response, Smith received an order from the South Carolina Supreme Court dated April 10, 2009. The order provided that although the Court had created a form for the application for forensic DNA testing, applications were not to be accepted for filing in any court until the Act was implemented. A footnote further explained that the Act would not be implemented until such time as general funds were appropriated or federal or other funds were received to begin implementation of the Act App. 453.

On September 1, 2010, Smith filed an application for PCR seeking DNA testing. This action was assigned case number 2010-CP-23-7261. App. 454 – 467. The Honorable Robin Stilwell issued a conditional order of dismissal on January 20, 2011 as untimely and successive. App. 474 – 479. Smith responded to the conditional order of dismissal explaining the tortured procedural history of his attempt to have access to forensic DNA testing. App. 480 – 493. After a hearing, the Honorable Edward Miller dismissed Smith's application as barred by the statute of limitations and successive. App. 530 – 536. Tricia A. Blanchette represented Smith, and Karen C. Ratigan represented the state. App. 499.

Smith attempted to appeal Judge Miller's decision. App 553 – 554. On April 2, 2012, the Clerk of the South Carolina Supreme Court wrote to Smith's counsel asking for an explanation of any arguable basis for asserting the determination by the PCR judge was improper. App. 555 – 556. Smith responded by explaining, among other things, his previous attempts to obtain forensic DNA

testing. App. 557 – 565. On May 29, 2012, all five justices of the South Carolina Supreme Court signed an order finding Smith had failed to show there was an arguable basis for asserting that the determination by the PCR court was improper. Thus, the Court dismissed the notice of appeal. Importantly, the Court added the following paragraph to its order:

> However, [Smith] may submit another Application for DNA Testing to the Greenville County Clerk of Court pursuant to the Access to Justice Post Conviction DNA Testing Act, see S.C. Code Ann. § 17–28–10, et seq. (Supp. 2011), and that application should be processed as set forth in the Act.

App. 566.

Smith filed a second application for forensic DNA testing on March 20, 2012 with the Greenville County Clerk of Court. App 568 – 572. On August 8, 2012, the Honorable Letitia H. Verdin denied Smith's application for post-conviction DNA testing after concluding the application was time-barred pursuant to section 17–28–30(B) of the South Carolina Code. Smith filed a motion to alter or amend pursuant to Rule 59(e), SCRCP on August 22, 2012. App. 583 – 588. On December 13, 2012, Judge Verdin denied Smith's motion to alter or amend. App. 589.

The South Carolina Code provides that an applicant who sought DNA testing pursuant to the Access to Justice Post-Conviction DNA Testing Act has "the right to appeal a final order denying or granting DNA testing by a writ of certiorari to the Court of Appeals or the Supreme Court as provided by the South Carolina Appellate Court Rules." S.C. Code Ann. § 17-28-90(G). By Order dated January 29, 2009, the South Carolina Supreme Court adopted Rule 247 as an amendment to the South Carolina Appellate Court Rules governing the procedures for certiorari to review DNA testing decisions. The amendment was submitted to the General Assembly as required by South Carolina's Constitution. After the passage of ninety days without rejection by the General Assembly, the Rule became effective on April 29, 2009 pursuant to a subsequent Supreme Court

Order. Specifically, the Rule provides that if the review involves forensic testing in a death penalty case or involves a challenge to the constitutionality of a state law or county or municipal ordinance, the notice of appeal must be filed with the Supreme Court. However, "[i]n all other cases, the notice of appeal shall be filed with the Court of Appeals." Rule 247 (b), SCACR.

Therefore, Smith filed his notice of appeal with this Court. App. 590 – 593. Smith, through undersigned counsel, filed a petition for writ of certiorari on November 27, 2013. Respondent filed a return to petition for writ of certiorari in support of certiorari on May 15, 2014 asking that certiorari be granted and posing four counter questions presented. On June 11, 2014, this Court granted the petition for writ of certiorari and ordered briefing in accordance with Rule 247(h), SCACR. Petitioner now files this brief.

ARGUMENT

The lower court erred in applying the seven-year time limit found in section 17–28–30(B) of the South Carolina Code, which applies to individuals who pled guilty or no contest by its clear and unambiguous language, to Orlando Smith's application for post-conviction DNA testing where Smith pled not guilty requiring application of section 17–28 –30(A) of the South Carolina Code, which has no time limit.

Relevant facts

On July 15, 2000, Smith pled not guilty and was tried by a jury on the charge of murder. App. 1. Smith testified in his defense and maintained his innocence. App. 229, line 19 – App. 230, line 18. In short, Smith testified to finding the deceased in her apartment and moving her in an attempt to revive her. App. 230, line 12, App. 243, line 11 – 244, line 21; App. 250, lines 10 – 18. On July 19, 2000, the jury convicted Smith of murder. App. 313, lines 21 – 23. Judge Patterson sentenced Smith to thirty years' imprisonment App. 321, lines 5 – 7. During the sentencing, Judge Patterson noted that the jury struggled for a long time during its deliberations. Although the judge knew nothing about the jury's actual deliberations, he noted that the record contained "no reason" why Smith would have committed the crime. In fact, Smith's prior criminal record was devoid of any acts of violence. App. 320, line 17 – App. 321, line 2.

In 2008, the South Carolina General Assembly passed the the Access to Justice Post-Conviction DNA Testing Act to permit incarcerated individuals, who had been convicted of certain offenses, access to DNA testing. On January 1, 2009, the Act became effective. S.C Code Ann. § 17–28–10, et seq. On February 17, 2009, Smith wrote to the local clerk of court requesting an application form for the Post-Conviction DNA Testing Act. App. 444. On March 19, 2009, Smith learned Court Administration was in the process of developing the Application for Forensic DNA

Testing, which would be distributed and posted on the court's website upon approval of the Supreme Court. App. 445.

On December 16, 2009, Smith submitted an application for forensic DNA testing to the Clerk of Court for Greenville County. App. 448 – 452. In response, Smith received an order from the South Carolina Supreme Court dated April 10, 2009 explaining that although the Court had created a form for the application for forensic DNA testing, applications would not to be accepted for filing in any court until the Act was implemented by the appropriation of funds. App. 453.

On September 1, 2010, Smith filed an application for PCR seeking DNA testing. App. 454 – 467. Judge Stilwell issued a conditional order of dismissal based upon the statute of limitations and the successive nature of the application. App. 474 – 479. Smith responded to the conditional explaining his multiple attempts to have access to forensic DNA testing. App. 480 – 493. Additionally, Smith sought discovery in his PCR action. App. 494 – 497. After a hearing on the matter, Judge Miller dismissed Smith's application as barred by the statute of limitations and successive He further denied the motion for discovery App. 530 – 536.

Smith filed a notice of appeal concerning Judge Miller's decision. App. 553 – 554. The Clerk of the South Carolina Supreme Court wrote to Smith's counsel asking for an explanation of any arguable basis for asserting the determination by the PCR judge was improper concerning the findings of untimeliness and successiveness pursuant to Rule 203(d)(1)(B)(v), SCACR. App. 555 – 556. Smith detailed his previous attempts to obtain forensic DNA testing. App. 557 – 565. On May 29, 2012, all five justices of the South Carolina Supreme Court signed an order finding Smith had failed to show there was an arguable basis for asserting that the determination by the PCR court was improper. Thus, the Court dismissed the notice of appeal. The Court added that Smith "may submit another Application for DNA Testing to the Greenville County Clerk of Court pursuant to

the Access to Justice Post Conviction DNA Testing Act, see S.C. Code Ann. § 17–28–10, et seq. (Supp. 2011), and that application should be processed as set forth in the Act." App. 566.

Smith filed another application for forensic DNA testing on March 20, 2012 App. 568 – 572 In the state's response to Smith's application, the assistant solicitor argued the application was not timely. Although the state quoted section 17-28-30(B) in full – including its applicability only to individuals who pled guilt - the state argued that the Act required Smith to file his application within seven years from the date of sentencing. The state explained that Smith had been sentenced on July 19, 2000 and his application for DNA testing was received on February 23, 2012; therefore the application was beyond seven years from the date of sentencing, which the state maintained was applicable to Smith. App. 575 – 578.[2]

On August 8, 2012, the Honorable Letitia H. Verdin denied Smith's application for post-conviction DNA testing after concluding that the application was time-barred pursuant section 17–28–30(B). Smith filed a motion to alter or amend pursuant to Rule 59(e), SCRCP, on August 22, 2012. Smith argued that Judge Verdin applied "the wrong code of law" to his application. Specifically, Smith explained that because he did not enter a guilty plea, section 17–28–30(B) did not apply to his application for forensic DNA testing. Instead, Smith argued, section 17–28–30(A), which has no limitations period, applied to his application App. 583 – 588. Nevertheless, on

[2] According to the state's response, the state received Smith's application for DNA testing on February 23, 2012. App. 576. However, the state failed to respond until June 19, 2012. App. 578. The Act requires the solicitor of the circuit in which the applicant was convicted to respond to the application within ninety days after the forwarding of the application. S.C. Code Ann. § 17– 28–50(B). May 23, 2012 was ninety days from February 23, 2012 and June 16, 2012, which was a Saturday, was ninety days from March 20, 2012. Smith is unaware of the state seeking or receiving any extensions of time to respond Indeed, Smith moved for default judgment on July 5, 2012. App 579 – 581. It appears from the record that no action was taken on Smith's motion for default judgment.

December 13, 2012, Judge Verdin denied Smith's motion to alter or amend. Specifically, the order stated:

> This court reiterates its finding that § 17-28-30(B) applies to those applicants who enter a plea of not guilty and were convicted at trial ("A person who ... was ... convicted ... for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for DNA testing ... no later than seven years from the date of sentencing.").

App. 589.

Discussion

As an initial matter, Respondent has conceded that Petitioner is entitled to relief. In its argument in favor of certiorari, Respondent stated, "The application of the seven year statute of limitations to Petitioner's 2000 conviction is likely an error of law." Return at 19. Further, Respondent "submit[ted] that reading the Act as a whole, it appear[e]d that Section A was intended to create a group of individuals who would not be subject to a seven year statute of limitations, bolstered by the additional requirements on the judicial system to maintain custody of evidence[3] in those cases beyond the seven year requirement when there was a conviction from trial and not a guilty plea." Return at 21.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist v State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998)

[3] Respondent referred to the Preservation of Evidence Act, which delineated offenses for which physical and biological evidence must be preserved. The Act provided for the preservation of evidence in certain enumerated offenses until the person is released from incarceration, dies while incarcerated or is executed. However, the Act required retention of such evidence for only seven years if the person entered a guilty plea. Return at 7-8; S.C. Code Ann. § 17-29-320(C).

(citations omitted). Where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. Id (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). In other words, "[t]he legislature's intent should be ascertained primarily from the plain language of the statute." State v. Sweat, 379 S.C. 367, 375, 665 S.E.2d 645, 649 (Ct. App. 2008). The language of the statute "must be read in a sense which harmonizes with the subject matter and accordance with its general purpose." Id.

The Access to Justice Post-Conviction DNA Testing Act provides:

> A person who pled not guilty to at least one of the following offenses, was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or a biological material related to his conviction or adjudication· (1) murder (Section 16–3–10).

S.C. Code Ann. § 17–28–30(A) (emphasis added). Therefore, to apply for forensic DNA testing under this subsection, a person must satisfy four requirements: (1) the person must have pled not guilty to an enumerated offense; (2) the person must have been convicted of the offense; (3) the person must be incarcerated for the offense; and (4) the person must assert his innocence of the offense.

In contrast, the Act provides a separate subsection for individuals who pled guilty or no contest to one of the enumerated offenses. Specifically, the act provides:

> A person who pled guilty or nolo contendere to at least one of the offenses enumerated in section (A), was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense, and asserts he

> is innocent of the offense may apply for forensic DNA testing of DNA and any physical evidence or biological material related to his conviction or adjudication no later than seven years from the date of sentencing.

S.C. Code Ann. § 17–28–30(B) (emphasis added). Therefore, to apply for forensic DNA testing under this subsection, a person must satisfy five requirements: (1) the person must have pled guilty to an enumerated offense; (2) the person must have been convicted of the offense; (3) the person must be incarcerated for the offense; (4) the person must assert his innocence of the offense; and (5) the person must apply for forensic DNA testing no later than seven years from the date of sentencing.

The plain language of section 17-28-30 is clear and unambiguous and must be applied accordingly. The plain language of the statute makes it clear that subsection (A) applies to individuals who pled not guilty. On the other hand, the plain language of the statute makes it clear that subsection (B) applies to individuals who pled guilty. Subsection (A) imposes no time limit for individuals who pled not guilty to file the application for forensic DNA testing, while subsection (B) imposes a time limit of seven years for individuals who pled guilty to file the application for forensic DNA testing. The language used by the legislature in the Act is susceptible to only one interpretation – the seven-year time limit applies only to individuals who entered guilty pleas. None of the terms used in the statute is ambiguous. The grammar and sentence structure create no confusion regarding the purpose and intent of South Carolina's legislature in creating a statute of limitations for individuals who pled guilty, but no such limitations period for those who did not.[4]

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[4] Respondent conceded this point: "It appears the Post-Conviction DNA Act is intended to apply to two classes of individuals; those who meet the requirements of S.C Code Ann. § 17-28-30(A) and those who meet the requirements of S.C Code Ann. § 17-28-30(B)." Return at 27. Respondent admitted that "individuals seeking post-conviction DNA testing under section 17-28-

Even the application, which was approved by the South Carolina Supreme Court, explains the limitations period applies only to individuals who entered guilty pleas. Specifically, the form includes the following statement:

> I understand that DNA testing is only available if I have been convicted or adjudicated of an offense listed in S.C. Code Ann. § 17-28-30, that I am currently incarcerated for that offense, and that I am asserting that I am innocent of that offense. Further, if the conviction or adjudication was the result of a plea of guilty or nolo contendere, the application must be filed within seven years of the date of sentencing.

App. 448 (form completed by Smith), App. 568(form completed by Smith); SCCA DNA 101 (04/2009) available at http://www.sccourts org/forms/pdf/SCCADNA101.pdf (form promulgated by the Supreme Court)(last viewed on Nov 26, 2013)(emphasis added).

Despite the clear and unambiguous language of the statute, the lower court found that subsection (B) applied "to those applicants who entered a plea of not guilty and were convicted at trial." The lower court's decision was based upon an obviously erroneous reading of the statute. Respondent admitted the lower court's "[l]imited reading of the section ignore[d] an unambiguous intent on the part of the legislature to create two separate groups where one pleads not guilty and goes to trial and one who pleads guilty." Return at 28. When Smith asked the lower court to reconsider its decision because he was convicted after a trial, meaning subsection (A) was applicable, not subsection (B), which applied to guilty pleas, the lower court "reiterate[d] its finding that § 17-28-30(B) applies to those applicants who enter a plea of not guilty and were convicted at trial ("A person who ... was .. convicted .. for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for DNA testing ... no later than

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30(B), unlike individuals seeking testing under Section 17-28-30(A), must file an application for post-conviction DNA testing within the seven (7) year period following that individual's sentencing. Return at 28.

seven years from the date of sentencing.")." App. 589. Inexplicably, the lower court specifically omitted the portions of subsection (B) indicating its applicability to individuals who pled guilty or no contest. The lower court made no mention of subsection (A) despite Smith's submission of the complete texts of subsections (A) and (B) with his motion to alter or amend. The lower court offered no explanation for its decision except its quotation of subsection (B) with the operative language omitted. See Return at 2 ("In her order Judge Verdin inexplicably removed from the statutory quote the portion of § 17-28-30(B) which included the phrase "... person who pled guilty or nolo contendere ...." This parsing gives an entirely different meaning to the phrase.")

Smith entered a plea of not guilty and was tried for the offense of murder. He was subsequently convicted of murder and is currently incarcerated for the offense. Smith continues to assert his innocence of the murder. Therefore, Smith satisfies all four requirements of section 17-28-30(A). Subsection (B) simply does not apply to Smith because he did not plead guilty. As a result, Smith is entitled to pursue forensic DNA testing pursuant to the Access to Justice Post-Conviction DNA Testing Act.

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the lower court and direct the proceedings commence in accordance with the statute.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 1st day of July, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Orlando Smith #267982, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 1st day of July, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day
of July, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022