

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

Roderick McRae, #236188,

Petitioner,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

2012-CP-370-0027

**ORDER DISMISSING PETITION FOR
WRIT OF HABEAS CORPUS**

FILED OCT 10 2012
BEVERLY J. HARRIS, CLERK
2011 SEP 11 PM 1 23

This matter comes before the Court by way of a document captioned "Memorandum of Factual Points and Legal Authorities Supporting Notice of Petition and Petition for Writ of Habeas Corpus," filed with the clerk January 10, 2012. Respondent made its Return and Motion to Dismiss this petition. This Order follows.

I. PROCEDURAL HISTORY

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. Petitioner was indicted at the March 1996 term of the Oconee County Grand Jury for Trafficking in Cocaine (1996-GS-36-268), Unlawful Possession of a Pistol by a Convicted Felon (1996-GS-37-585), Possession of Marijuana (1996-GS-37-271), Driving Under Suspension (1996-GS-37-270), and Carrying a Pistol (1996-GS-37-269). Petitioner was represented on the charges by Ernest E. Yarborough, Esquire. On August 13-14, 1996, Petitioner received a jury trial before the Honorable Alexander S. Macaulay on charges of Trafficking in Cocaine, Possession of Marijuana, and Unlawful Possession of a Pistol. He was found guilty on those three charges as indicted. Judge Macaulay sentenced Petitioner to life imprisonment for Trafficking in Cocaine, pursuant to S.C. Code Ann. § 17-25-45, as Petitioner had prior convictions of Trafficking in Cocaine and Manslaughter.

Petitioner was also sentenced to five (5) years imprisonment for Possession of a Pistol, and one (1) year imprisonment for Possession of Marijuana to be served concurrently.

Petitioner filed and served a timely notice of appeal. Assistant Appellate Defenders Richard H. Warder and Cheryl Aaron, Esquires represented Petitioner. On June 30, 1998, Petitioner filed his final brief, in which he presented two issues for review:

1. The trial judge erred in denying Appellant's motion for a mistrial on the grounds that several members of the jury had read and discussed a newspaper article during the trial which revealed the Appellant's prior criminal record and possibility of life without parole sentence.
2. The trial judge erred in not declaring a mistrial on the court's own motion because during the trial the jury read and discussed a newspaper article which contained the defendant's prior record, and further because of prosecutorial misconduct in releasing to the media the Appellant's prior record and possible sentence in this matter.
3. The disclosure to the jury of the newspaper article containing Appellant's two prior convictions for violent offenses is not harmless error.

Assistant Attorney General G. Robert DeLoach, III represented the State on appeal. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentence in an unpublished opinion. State v. McRae, 1999-UP-303 (S.C. Ct. App., filed May 18, 1999). Petitioner did not petition for rehearing and the court of appeals sent the remittitur to the Oconee County Clerk of Court on June 8, 1999.

First Post-Conviction Relief Action (2000-CP-37-006)

Petitioner subsequently filed an application for post-conviction relief on January 6, 2000, where he alleged he was being held unlawfully for the following reasons:

1. Ineffective assistance of counsel.

The State filed its return on or about March 23, 2000. An amended application was filed on March 10, 2003, through counsel James H. Price, III, Esquire, in which he made the following claims:

1. Prosecutorial misconduct; Applicant was denied due process of law and effective assistance of counsel when the solicitor willfully revealed information about the case to the news media and trial counsel failed to properly defend the Applicant against this prosecutorial misconduct and preserve the issue for appeal review. . .
2. Trial counsel was ineffective for failing to challenge the provisions of Section 17-25-45. . . and Applicant was denied due process and equal protection of the laws. . .
3. Applicant's life sentence and Section 17-25-45(B) are in violation of S.C. Const., Art. XII. § 2, and the substance due process clause and equal protection clauses. . ., and trial counsel was ineffective in failing to challenge the constitutionality of the life sentence and Section 17-25-45(B) for these reasons. . .
4. The General Assembly violated the single subject clause of S.C. Const. Art. III, § 17 when it enacted Bill 3096 "Truth-in-sentencing" when it included within one bill unrelated provisions, and 17-25-45(B) of that act and Applicant's life sentence are unconstitutional, and Applicant was denied due process of law and effective assistance of counsel. . .
5. Applicant was denied the effective assistance of trial and appeal counsels in violation of his guaranteed rights of S.C. Const. Art. 1, §§ 3 & 14 and the Sixth and Fourteenth Amendments of the United States Constitution.

An evidentiary hearing was convened on August 6, 2003, at the Oconee County Courthouse before the Honorable J. Cordell Maddox, Jr. Petitioner was present and represented by counsel Price. Respondent was represented by Assistant Attorney General W. Bryan Dukes. Petitioner was the only witness, and testified on his own behalf. Judge Maddox denied and dismissed the application in its entirety by written Order filed August 27, 2004. The Order of Dismissal fully addressed the merits of Petitioner's claims that trial counsel was ineffective in (1) failing to object to a curative instruction given by the court regarding newspaper ads, and (2) failings to challenge the constitutionality of the South Carolina's "three-strikes" statute.

Petitioner appealed the denial of his post-conviction relief application. Tara Dawn Shurling represented Petitioner in the collateral appellate proceedings. On October 31, 2005, counsel filed a petition for writ of certiorari asserting the following grounds:

1. Did the lower court err in ruling that defense counsel was not ineffective in failing to see a mistrial based on prosecutorial misconduct?
2. Did the lower court err in ruling that defense counsel was not ineffective in failing to seek a mistrial where the record reflects that the jury engaged in premature deliberation?
3. Did the lower court err in ruling that defense counsel was not ineffective in acquiescing in a curative instruction that was inadequate to remove the undue prejudice?

The State filed a Return to Petition for Writ of Certiorari on December 30, 2005. Petitioner filed a Reply to the Return to Petition for Writ of Certiorari on January 23, 2006. The Supreme Court of South Carolina entered an Order denying the petition for writ of certiorari in an unpublished order filed on December 18, 2006. The remittitur was issued on January 4, 2007.

First Federal Habeas Corpus Action (9:07-cv-01521-HFF-BM)

The Petitioner then filed a petition for writ of habeas corpus on May 31, 2007. Petitioner raised the following issues verbatim:

1. The trial judge erred in denying Petitioner's motion for a mistrial on the grounds that several members of the jury had read and discussed a newspaper's article during the trial which revealed the Petitioner's prior criminal record and possible life without parole sentence, which was a denial of due process of law.
2. The trial judge erred in not declaring a mistrial on the court's own motion because during the trial on these charges the jury read and discussed a newspaper article which contained the defendant's prior record, and further because of prosecutorial misconduct in releasing to the media the defendant's prior record and possible sentence in this matter, this was a denial of due process of law.
3. The disclosure of the newspaper article containing Petitioner's two . . . convictions for violent offenses is not harmless error because it violated Petitioner's due process rights.
4. Defense counsel was ineffective for failing to seek a mistrial based on prosecutorial misconduct, which violated Petitioner's Sixth Amendment Right.
5. Defense counsel was ineffective in failing to seek a mistrial where the record reflects that the jury engaged in premature deliberation, which violated Petitioner's Sixth Amendment Right.
6. Defense counsel was ineffective in acquiescing in a curative instruction that was inadequate to remove the undue prejudice.

On September 5, 2007, Respondent filed a motion for summary judgment. The federal district court granted Respondent's motion for summary judgment by Order dated September 2, 2008, finding that Petitioner's claims were without merit. Petitioner then filed a notice of appeal on October 6, 2008. The Fourth Circuit Court of Appeals denied a certificate of appealability and dismissed the appeal on August 12, 2009. The court then mandated the judgment on September 3, 2009.

II. CURRENT PETITION FOR HABEAS CORPUS

In his Petition for Writ of Habeas Corpus, Petitioner alleges the following grounds for relief:

1. Insufficient evidence (proof) to support convictions.
 - a. Petitioner submits that since the State failed to establish a Nexus between Petitioner and the bag by sufficient evidence, he is entitled to relief.
2. Solicitor (prosecutor) misconduct.
 - a. Petitioner submits that the Solicitor's act of introducing irrelevant evidence of guilt within it being exclusively supported by perjury-type
3. Judicial misconduct.
 - a. Petitioner submits that the Trial Judge's decision to enter Exhibits which were irrelevant to showing Petitioner's guilt, was a decision amounting to Misconduct, in light of ultimate Evidence entered, which would support this Court's grant of Demanded relief.

Petitioner also served Respondent with a document captioned "Notice Motion Inordinate Delay" where he asks this Court to "bring the Petitioner to court within Ten days. . ."

This Court has reviewed the records of the Oconee County Clerk of Court, Petitioner's prior post-conviction relief records, Petitioner's prior federal habeas records, and Petitioner's South Carolina Department of Corrections' records.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

“A habeas corpus petition must support the requested relief.” Gibson v. State, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (1998) (citations omitted). Although the allegations in the petition are to be treated as true, a petitioner must make out a *prima facie* case showing he is entitled to relief and he must present sufficient factual allegations to support the petition before he is entitled to a hearing. Id. at 40, 495 S.E.2d at 427-28.

To warrant a hearing, the petition must include the two allegations described below. First, the petition must allege the petitioner has exhausted all available post-conviction relief remedies. Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998); Gibson, 329 S.C. at 42, 495 S.E.2d at 428. “Exhaustion includes filing of an application, the rendering of an order adjudicating the issues, and petitioning for, or knowingly waiving, appellate review.” Gibson, 329 S.C. at 42, 495 S.E.2d at 428. Second, the petition must allege sufficient facts to show why other remedies, such as post-conviction relief, are unavailable or inadequate. Id. Post-conviction relief is not rendered “unavailable or inadequate” merely because the petitioner’s application might be dismissed as procedurally barred.

In fact, any matter that is cognizable under the Uniform Post Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10 to -120 (2003), “must be raised in PCR application, and may not be raised by a petition for a writ of habeas corpus before the circuit or other lower courts.” Al-Shabazz v. State, 338 S.C. 354, 365, 527 S.E.2d 742, 748 (2000); Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998). The Uniform Post Conviction Procedure Act (the Act) is “broadly inclusive and will rarely be inadequate or unavailable to test the legality of the detention.” Gibson, 329 S.C. at 41, 495 S.E.2d at 428. A petitioner may even allege constitutional violations in PCR proceedings, unless the issue could have been raised by the

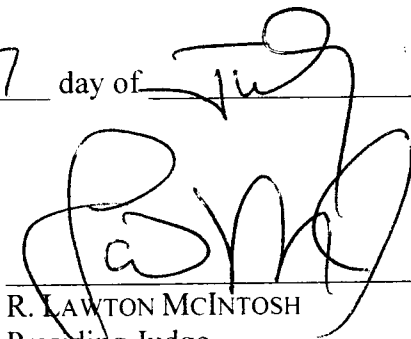
petitioner on direct appeal. Id.

Thus, “[a] person is procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which could have been raised in a PCR application.” Keeler v. Mauney, 330 S.C. 568, 571, 500 S.E.2d 123, 124 (Ct. App. 1998). “Furthermore, if a person is procedurally barred, his only means of obtaining state habeas corpus relief is to file a petition in the original jurisdiction of the Supreme Court.” Id.

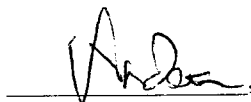
This Court agrees with Respondent that the claims made in the Petition for Writ of Habeas Corpus could have been and were indeed raised in the Petitioner’s direct appeal, post-conviction relief application, and federal habeas review. Therefore, these claims cannot be raised in a Petition of Habeas Corpus in the Circuit Courts of South Carolina. Accordingly, the Petition should be summarily dismissed.

IT IS THEREFORE ORDERED that the Petition for Writ of Habeas Corpus is hereby denied and dismissed with prejudice.

AND IT IS SO ORDERED this 17 day of July


R. LAWTON MCINTOSH
Presiding Judge
Tenth Judicial Circuit

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, South Carolina.

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