

State of South Carolina
County of Saluda

In the Court of Common Pleas
Case No. 2013-CP-41-10

Montavis Gaines #323168)
Applicant,)
)
)
v.)
)
)
)
State of South Carolina)
Respondent.)

Objection to response
to consider conditional
order of dismissal

CLERK OF COURT
SALUDA CO. S.C.

2014 FEB 28 AM 11:16

FILED

This matter comes before this court by way of an application for ~~Post-Conviction Relief~~ second P.C.R. filed January 16, 2013. In its Return, respondent request that the acting be summarily dismissed as successive on October 7, 2013. The Applicant filed a motion on February 24, 2014. Objection to Response to consider conditional order of dismissal entered on October 21, 2013. The Clerk of Courts Office of Saluda County received the conditional order of dismissal, signed by the Honorable Thomas A. Russo, on February 6, 2014. The Applicant received it on February 10, 2014.

C A S E H I S T O R Y

The records before this court reflect that the Applicant, along with co-defendant, Jerome Rhoads, was indicted at the November 2006 term of General Sessions for Assault and Battery with Intent to Kill (2006-GS-41-0421), Criminal Conspiracy (2006-GS-41-0420), Armed Robbery, (2006-GS-41-0419). The Applicant claimed his innocence at trial, and demanded a jury trial on, July 26, 2007. His position is that he didn't know anything about the crime. Michael R. Ellisor, Esquire, represented the Applicant at trial. The Applicant was found guilty on all counts based on the State's witness' sole testimony, Jerome Rhoads. The Honorable William P. Keesley, sentenced the Applicant to a total term of twenty (20) years.

A P P E A L H I S T O R Y

A timely Notice of Appeal was filed on the Applicant's behalf, and an appeal was perfected. A brief was filed on the Applicant's behalf as well, pursuant to Anders v. California, 386 U.S. 738 (1967). Katherine H. Hudgins represented the Applicant on his appeal.

Additionally, the applicant was given a forty-five (45) days' notice to file a pro se brief addressing any issues he believed the court should consider on appeal, in which the Applicant did so accordingly.

The court of Appeals dismissed the Appeal, State v. Gaines 2009-UP-446, (S.Ct. App. filed October 2, 2009). The remittur was sent on October 21, 2009.

P. C. R. H I S T O R Y

Subsequently, the applicant filed a timely P.C.R. on, November 6, 2009 (2009-CP-41-0176). Richard R. Gleissner represented the Applicant on his Post-Conviction Relief hearing.

By the order dated, April 5, 2012, and filed April 11, 2012, the Honorable Eugene C. Griffith Jr. denied and dismissed the application with prejudice. Concluding that the Applicant has failed to present any evidence of a deal existed between the State, and his co-defendant, Jerome Rhoads, and that the Applicant has not established any constitutional violation, or deprivation that would require the court to grant his application for Post-Conviction Relief.

R U L E 59(e) H I S T O R Y

On April 23, 2012, the Applicant file a Rule 59(e) motion pursuant to the said rule, to reconsider the order on May 22, 2012. The Honorable Judge Griffith, filed an order denying the Applicant's Rule 59(e) motion.

South Carolina Supreme Court History

A timely Notice of Appeal was filed on the Applicant's behalf, and a petition for Writ of Ceterari brief was also filed on the Applicant's behalf. Wanda H. Carter, Esquire, represented the Applicant on his appeal.

The Applicant presently has a P.C.R. hearing on appeal, pending before the South Carolina Supreme Court.

Rule 60(b) S.C.R.C.P. History

As it relates to the actions of counsel on the first P.C.R. matter, counsel found it particularly disturbing that the Applicant's second application included information that was not provided to him in the first P.C.R. matter when counsel was appointed. In July, of the year 2013, the Applicant forwarded counsel an application for P.C.R., that the Applicant filed in 2013. Counsel was not appointed in the subsequent P.C.R., but the Applicant requested counsel to review his application, with the Saluda County Police Incident report enclosed, dated December 4, of the year 2006.

After counsel reviewed the Second Application for the Applicant's P.C.R. hearing, he contacted the Appellant Counsel for the Applicant, by letter dated July 23, 2013. In mid August, the Applicant's counsel on appeal, was willing to assist, and allow the Applicant's first P.C.R. counsel to request a leave of the appeal process to file a Rule 60(b) motion.

On September 16, 2013, the first P.C.R. counsel, filed the motion for leave with the trial court. the South Carolina Supreme Court, denied counsel motion for leave to file a Rule 60(b) motion on November 7, 2013, because of the second application for P.C.R., that was currently pending in the circuit court.

ARGUMENT

The applicant lays out a timeline within the case history that states specific reasons why his second P.C.R. application for a P.C.R. should not have been ruled successive, in regards to having it filed within the one year statute of limitations. A question of fact that's being raised, can only be resolved by a hearing. This is particularly so in, Delaney v. State, 238 S.E. 2d 697, (1977). Where an applicant alleges facts that would establish an exception to either a successive P.C.R. application, or not; and those facts (see summary dismissal), generally are refuted by records that should be brought before the P.C.R. court when considering the Summary Dismissal, where no evidentiary hearing has been held. The P.C.R. Judge must assume facts presented by the Applicant are true, and view those facts in the light most favorable to the Applicant. Leaman v. State, 611 S.E. 2d 494, 495, (2005). Citing S.C. Code Ann §17-27-30.

During the first P.C.R. hearing, the Applicant testified to the affect that the prosecutor's had committed prosecutorial misconduct, for failure to disclose the agreement between the State, and Mr. Rhoads, in which Rhoads was to receive favorable treatment in exchange for his testimony, against the Applicant. See P.C.R. history, and Rule 60(b) history.

At the P.C.R. hearing, Rhoads testified that he had had a deal with the State, but the Applicant, or nor did his counsel at the time, have a statment that was synonomous with the Saluda Police Incident Report, that the Applicant acquired later, that was in opposition of the prosecutions office, avering that Rhoads did not have a deal with the State, in exchange for his testimony, against the applicant. During trial, the respondent witness's vehemently denied the existence of a deal.

In the process of the Applicants appeal from the denial of his P.C.R, The Applicant continued to write letters to each agency that was involved with his case, to notify them of his newly discovered evidence. The fact that Rhoads testified that he had had a deal with police, whom is a constituent of the prosecuting office. The prosecuting attorney has a duty to learn

of any favorable evidence known to other government agents, including the police, if those agents are involved in the investigation. Kyles v. Whitley, 514 U.S. at 437.

It is true indeed, that the Applicant filed a Rule 5 motion, to the Saluda Clerk of Courts Office, and another to the Saluda Police Department, on October 1, 2012. See Exhibit (B) attached to motion.

At the time of this request, via FOIA, for the newly discovered evidence, The Saluda Sheriffs Office, was newly inaugurated with a Sheriff, and a Chief, due to the malfeasance within the department. The previous Sheriff's deputy, whom was also fired, was the interrogative officer of Rhoads deal. See letter from acting Sheriff.

The Applicant only received this information through the grace of a newly inaugurated department. The information was being withheld by the previous misappropriated department. Therefore this information was not attainable at the time of trial, or the P.C.R. hearing, until the necessary procedure was taken to correct the Sheriff's Department. Judge Griffith clearly states in his denial, that the Applicant lacked evidence to support a deal existed between the State and Mr. Rhoads. See P.C.R. History.) Finding this evidence, puts the entire case in a different light, according to Judge Griffith's comments. Certainly, the States nondisclosure undermines the confidence in the verdict at trial. Pertinent citations, and reasons in the second P.C.R. application, are established, and if granted will suffice the "fundamental fairness" exception recognized by the United State Supreme Court.

The Applicant P.C.R. was denied on April 11, 2012. An appeal was filed on June 6, 2012, and the incident report was sent to the Applicant on December 6, 2012, within the same year of entry of the order, in a letter from the Chief of Police. See Exhibit (C) attached to motion. This was clearly within the time of discovering newly discovered evidence to juxtaposedly, argue the government failed to disclose information material to impeach the states witness.

The Applicant filed his second P.C.R. application, on January 16, 2013, to protect the statute of limitations against his newly discovered evidence. The Applicant also avers he had had this incident report within the non-limitation on newly

discovered evidence, at the time of the entry of the order was filed. See Exhibit (A), attached to the motion.

The applicant added in the effect that this evidence, (incident report), was not disclosed in the first P.C.R. matter, that counsel asked for inside of the Rule 5 interrogatories. The information that was subsequently retrieved by the Applicant has a reasonable probability that the outcome of the first P.C.R. matter would have been quite favorably entertained by the P.C.R. Judge, given Judge Griffith's reason for dismissal.

The applicant states that the proper applicable mechanism, was to file a second P.C.R., to bring this matter before the court, based on newly discovered evidence. The burden is on the Applicant to establish that any new ground be raised subsequent application application, when it could not have been raised in a previous application. Alice v. State, 409 S.E. 2d 392 (1991). The Applicant took the only initiative, and avenue known to him as a pro se litigant.... If the court would take into consideration the effect of the nondisclosure into account, and note the cumulative effect of the suppressed evidence in light of other evidence, and not merely the probative value of the suppressed evidence standing alone. Due Process requires that an agreement made with a government witness for testimony in exchange for favorable treatment in the criminal justice system, should be disclosed as impeachment evidence. Granting the Summary of Dismissal would deny the Applicant the fundamental fairness, guaranteed by Due Process.

The Applicant states that he has established a sufficient reason, why he could not have raised this current allegation in the first P.C.R. application, at least without success, without the newly discovered evidence. The Applicant avers, that he could not have obtained this information, when the prosecutors failed to disclose the potentially exculpatory evidence. Furthermore, due to the prosecutorial misconduct in failing to disclose, it was only the Applicant's due diligence, subsequently after being denied, that he made this requisite discovery. Just like the jury, the Judge Griffith was entitled to know of this information.

The P.C.R. court may grant a motion by either party for summary disposition of the P.C.R. application when... there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. S.C. Code Ann §17-27-70(c).

The applicant states that the State motion for Summary Dismissal does not apply in this case to dismiss the Applicants second P.C.R. as successive, due to the fact that it was filed within the one-year statute of limitations for newly discovered evidence. The State has not presented any genuine evidence of material fact to support their claim, that has been refuted by record, before the P.C.R. court, by the Applicant.

C O N C L U S I O N

The Applicant has shown that he has newly discovered evidence that was not available to him at the original trial, and not provided to him in his original Post-Conviction Relief application. This evidence clearly impacts the question of whether his alleged co-conspirator had had a deal with the prosecution. In this instance the Applicant has proved each and every allegation by the preponderance of the evidence that clearly shows a Brady violation, which should not be ruled as successive, because it is within the one year statute of limitation, which can only be resolve through a hearing.

Date 2-24-14

s. M. Gainer

Montavis K. Gaines #323168

Applicant,

v.

State of South Carolina,

Respondent,

C E R T I F I C A T E O F S E R V I C E

I certify that a true copy of the objection to response to consider conditional order of dismissal, and a copy of the exhibit (A), (B), (C), attached to the Applicants motion has been served upon the opposing party's by placing two(2) copies in the first class mail with sufficient postage prepaid addressed to:

Deris B. Holmes
Saluda County Clerk of Court
100 East Church Street, suite 6
Saluda, South Carolina 29138

Mary S. Williams
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Date, 2-24-14

s? M Gaines

Saluda Police Department
INCIDENT REPORT

CASE NUMBER
061000453-T

AGENCY ID
SC0410100

TYPE VICTIM
Individual
Business
Financial Ins
Government
Relig. Org.
Soc./Public
Other
Unknown
Police Off.

INCIDENT TYPE				COMPLETE	FORCED ENTRY	PREMISE	UNITS ENTD						
1. ARMED ROBBERY				<input checked="" type="checkbox"/> YES	<input type="checkbox"/> NO								
2.													
3.													
INCIDENT LOCATION SALUDA COUNTY DETENTION CENTER				ZIP CODE 29138-	WEAPON TYPE								
INCIDENT DATE	24hr CLOCK TO	DATE	24hr CLOCK	DISP DATE	DISP TIME	TIME ARRIVE	DEPART TIME	LOCATION NO					
10/11/2006	14:55	10/11/2006	15:00	10/11/2006									
COMPLAINANT'S NAME			RELATIONSHIP TO SUBJ	RES	RACE	SEX	AGE	ETH.	DAYTIME PHONE	EVENING PHONE			
			#1 #2 #3						H B	H B			
ADDRESS				CITY	STATE	ZIP CODE	LOCATION NO						
VICTIM'S NAME			RELATIONSHIP TO SUBJ	RES	RACE	SEX	AGE	ETH.	DAYTIME PHONE	EVENING PHONE			
			#1 #2 #3						H B	H B			
LOCAL CASH ADVANCE, HEIGHT, WEIGHT, HAIR, EYES, FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.													
ADDRESS				CITY	STATE	ZIP CODE	LOCATION NO.						
429 TRAVIS AVE.				SALUDA	SC	29138-							
VISIBLE INJURY (VICT. 1) YES X NO EXPLAIN:					COMPLAINT OF ANY NON-VISIBLE INJURIES: YES X NO								
VICTIM (NO. 1) USING: ALCOHOL YES NO X UNK DRUGS: YES NO X UNK TYPE:													
TWO-MAN VEH		ONE-MAN VEH		DETECTIVE/SPECIAL		OTHER		ALONE		ASSISTED		J-This Jurisdiction S-State O-Out of State U-Unk	
X SUSPECT		NAME (LAST, FIRST, MIDDLE)		RACE	SEX	AGE	ETH	DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES	
RUNAWAY		Rhodes, Jerome.		B	M	32	N	08/06/1974	306	165	BLK	BRN	
WANTED		FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.											
WARRANT		ADDRESS			CITY	STATE	ZIP CODE	LOCATION					
ARREST		Projects, Bouknight Ferry Rd.			Saluda	SC	29138						
JAIL		SUBJECT (#1) USING ALCOHOL: YES NO X UNK			ARREST NEAR SCENE YES DATE/TIME OFFENSE		DATE/TIME ARRES						
SUMMONS							10/11/2006						
DRUGS: YES NO X UNK TYPE:			TOTAL # ARRESTED		0		14:55						

On 12/04/06 and approximate time, I Officer Turner, interviewed Jerome Rhodes (the subject) at the Saluda County Jail where subject wrote a statement about his involvement and involvement of the co-defendants of the case that occurred on 10/11/06. Subject now willing to testify for leniency from the State. In reference to subject, I spoke to the Solicitor's Office on his behalf for a lighter sentence in exchange for subject's testimony.

JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY				JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY				
TYPE (GROUP)	CASH						TOTAL VALUE	
STOLEN	1,000.00						1,000.00	
DAMAGED								
BURNED								
RECOVERED								
SEIZED								
COUNTERFEIT								
UNKNOWN								
SUBJECT IDENTIFIED	SUBJECT LOCATED	X ACTIVE	ADM CLOSED	ARRESTED UNDER 18		EX-CLEAR UNDER 18		
<input checked="" type="checkbox"/> YES	<input checked="" type="checkbox"/> YES	UNFOUNDED		X ARRESTED 18 AND OVER		EX-CLEAR 18 AND OVER		
REASON FOR EXCEPTIONAL CLEARANCE:								
OFFENDER DEATH		NO PROSECUTION		EXTRADITION DENIED		VICTIM DECLINES COOPERATION		
JUVENILE-NO CUSTODY								
REPORTING OFFICER(S)	DATE	UNIT #	APPROVING OFFICER				DATE	UNIT #
J.A. TURNER	12/04/06	SPD5	FOLLOW-UP OFFICER					
INVESTIGATION No								

EXHIBIT - A

State of South Carolina
County of Saluda
The State

In the Court General
Sessions

- vs -

Montavis K. Gaines
Defendant

Request For Discovery of
Favorable to the Defendant

2012 OCT -7 PM 2:43
CLERK OF COURT
SALUDA CO. S.C.

FILED

Now comes the Defendant Pro Se, pursuant to Rule (5) of the South Carolina Rules of Criminal Procedure, in addition to Brody v. Maryland, 373 U.S. 83 (1963); Napue v. Illinois, 360 U.S. 364 (1959); Moore v. Illinois, 408 786 (1972) that your office supply to me or make available for inspection, all evidence which may be favorable to the Defendant with regard to the offense with which he has been charged on octe 11, 2006 with Armed Robbery, Criminal Conspiracy and Assault and Battery with intent to kill

- (A) All statements, confessions or notes taken as a result of discussions with any witnesses or co-Defendant the state may call to testify at the trial of this case.
- (B) Any other evidence or information which might lead to evidence tending to lessen the credibility of any of the potential witnesses for the state, or which in any other way might tend to show that the Defendant is not guilty of the charges against him/her.

EXHIBIT - B

Recognizing that Brady v. Maryland, supra and other authorities cited require that only information favorable to the defendant be made available, and further recognizing that a genuine disagreement may arise as to whether or not particular item of evidence is favorable, it will be required that the court order to provide for "in camera" inspection of the items sought to be discovered, should you feel that such items are not favorable to the defendant. By permitting the court to examine the items requested, the legitimate interests of the state will be protected in that no disclosure in excess of Brady, et al., will occur. Further it will be a continuing one, provided that in the event any items sought to be discovered herein become available subsequent to making of the order pursuant to this motion, any agreement between the prosecution and co-defendant Jerome Rhodes Rhodes testified that he did have a deal with law enforcement.

The purpose of said motion is to enable the defendant herein to properly prepare a defendant to the offenses charged and to properly prepare for the examination of any witness whom may testify in this case. Defendant would show that the failure to produce any of the foregoing evidence or information by the law enforcement agency involved would result in a violation of the Fifth, sixth, and Fourteenth Amendment of the constitution of the United States.

In the state of South Carolina
County of Saluda

Montavis K. Gaines

vs.

State of South Carolina
Defendants.

In the court of common
pleas

Certificate of service

I the undersigned defendant Montavis K. Gaines hereby certify that I have served the motion pursuant to Rule (5) SCRPC in the above captioned matter by placing a copy in the first class mail ~~with~~ with sufficient postage prepaid addressed to

Doris B. Holmes
Saluda County Clerk of Court
100 East Church St. Suite 6
Saluda, SC 29138

Saluda Police Department
101 South Jefferson St
Saluda, SC 29138

Montavis K. Gaines
Montavis K. Gaines
386 Redemption way
McCormick SC 29899

2012 OCT - 1 PM 2:43
CLERK OF COURT
SALUDA CO. S.C.

FILED

TOWN OF
SALUDA

SOUTH CAROLINA

101 South Jefferson Street Saluda South Carolina 29138

• Phone 864-445-7336 • Fax 864-445-7065

Town of Saluda@link.com

Montavis Kentrail Gaines
McCormick Correctional Institution
386 Redemption Way
McCormick, South Carolina 29899

RE: State v. Montavis Gaines

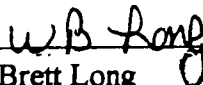
December 6, 2012

Dear Mr. Gaines,

This letter is to check on whether or not you have received the information that I forwarded to you previously. Officer Turner is no longer employed with this office. He is currently employed at Louis Rich. As a result, I have been assigned to investigate into the allegations of misconduct that you have made against Mr. Turner. I have requested for Mr. Turner to come in and speak to me at here at the Saluda Police Department. He has indicated to us that he was the investigating officer for this matter that occurred on October 11, 2006.

Please confirm that you now have what you need.

Sincerely,



Brett Long
Acting Chief of Police

Cc: Montavis K. Gaines

EXHIBIT-C