
The State of South Carolina

Supreme Court

Appeal from York County
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge
2012-CP-46-03762

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JAN 14 2015

S.C. Supreme Court

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Devon Miles Brown,

Petitioner,

v.

2014 - 000802

State of South Carolina,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Did the PCR court err in its determination that the Post Conviction Relief Application was untimely?
- II. Did the PCR court err in refusing to rule on the merits of the ineffective assistance of counsel claim pertaining to trial counsel's failure to investigate and challenge the use of two prior invalid convictions, which resulted in a mandatory 25-year sentence.

STATEMENT OF THE CASE

Petitioner Devon Miles Brown was charged with trafficking marijuana third offense and faced a mandatory 25-year sentence. At the time his criminal case commenced, his counsel had been out of law school a mere 16 months and admitted to the bar for less than a year. App. 59-60. After a two-day trial, he was convicted and immediately sentenced to 25 years in prison.

On his direct appeal to the South Carolina Court of Appeals, the court affirmed his conviction and sentence. On August 30, 2011, the court of appeals denied his motion to recall the remittitur, to reinstate the appeal, and to enlarge the time to file a petition for rehearing. App. 1. Within 30 days of the court of appeals decision denying the motion, Mr. Brown filed in this Court a Petition for Writ of Certiorari to the South Carolina Court of Appeals. On October 25, 2011, the Court issued an order, which, after setting out the relevant facts and citations to legal authorities, dismissed the petition. App. 2-3. Within one year of this

Court's October 25, 2011 decision dismissing his petition, Mr. Brown filed an Application for Post Conviction Relief on October 24, 2012. App. 4, 120, 135.

In his application he claimed that his trial attorney violated his 6th Amendment right to counsel. In item 10 (a) of the application, he set out two grounds for his claims, one, that trial counsel failed to inform him that he would receive a mandatory 25-year sentence if he was convicted at trial, which caused him to reject a 5-year plea bargain, and two, that counsel failed to investigate and challenge two invalid New York convictions at his sentencing, which resulted in his 25-year sentence. App. 8. In item 10 (b) of the application, he set out three additional grounds underlying his claims that his counsel was ineffective. All three grounds pertained to trial counsel's failure to make contemporaneous and specific objections – the first to the admission of the marijuana, the second to the admission of uncharged crimes evidence, and the third to the trial judge's erroneous instructions. App. 8.

The State moved to dismiss application as untimely and claimed that the one-year statute limitations expired on June 23, 2012, one year after the court of appeals sent the remittitur. Mr. Brown, in his written reply in opposition to the conditional order of dismissal, argued that his application was timely since it was filed within one year of *the filing of the final decision upon [his] appeal, i.e.* this Court's October 25, 2011 decision dismissing the petition for writ of certiorari [S.C. Code Ann. 17-27-45 (A)]. *See* App. 122-123. At no time has Mr. Brown conceded that his application was untimely.

Prior to the start of the PCR hearing the State again raised the statute of limitations issue. App. 18-21. Mr. Brown, intending not to pursue his three contemporaneous objection claims set forth in 10 (b), but intending to pursue both his *Lafler* and sentencing claims set out in 10 (a), vaguely referred to these latter claims as the *Lafler* claims. See App. 19-20. The PCR court however misinterpreted Mr. Brown's decision and erroneously assumed that only the *Lafler* claim would be pursued.

Although his language lacked precision, it is clear that Mr. Brown pursued his claim that trial counsel rendered ineffective assistance of counsel when he failed to investigate and challenge the two invalid convictions. He moved into evidence the transcripts of his guilty pleas, which lead to the convictions used to enhance his sentence. App. 40-42. Both transcripts of the pleas demonstrate that Mr. Brown neither was informed of his constitutional rights nor waived his constitutional rights, thus rendering his convictions invalid as not knowing, intelligent, and voluntary. See 109-119. Moreover he cross-examined his trial counsel regarding counsel's efforts to ascertain whether the convictions were valid. App. 63-82. He argued that the evidence supported his claims not only that counsel's performance was deficient, but also that he was prejudiced as a result of counsel's deficient performance. App. 102-103. Accordingly, the PCR court is mistaken in its assertion that Mr. Brown proceeded only on the claim that his trial counsel rendered ineffective assistance of counsel for not properly

advising him concerning the plea offer from the State under *Lafler v. Cooper*. App. 123.

ARGUMENT

- I. The PCR court err in its determination that the Post Conviction Relief Application was untimely since it was filed within one year of the filing of the final decision upon an appeal.

In relevant part, S.C. Code Ann. § 17-27-45 provides as follows:

(A) An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or *the filing of the final decision upon an appeal*, whichever is later.

South Carolina law provides for direct appeals in criminal cases to court of appeals and to this Court. *See* Chapter 9 of Title 18, S.C. Code Ann. and S.C. Code Ann. § 18-9-10. Moreover, this Court is vested with appellate jurisdiction to correct errors of law. *See* Article V, § 5, of the South Carolina Constitution and S.C. Code Ann. § 14-3-330. And the decisions of this Court are binding precedents upon the court of appeals. Article V, § 9, South Carolina Constitution. In light of these governing principles, the plain text of § 17-27-45 (A) compels the conclusion that the October 25, 2011 Order of this Court is the final decision upon the appeal. Indeed, the October 25, 2011 Order is *final* because it is one issued by the State's highest court. Furthermore since it was issued at a time Mr. Brown's case was on direct review, it a decision that is *upon the appeal*. Accordingly, the application for post conviction relief was filed within the one-year statute of limitations.

However, assuming *arguendo* that the PCR court was correct in its determination that the June 23, 2011 date represents the start of the limitations period, the doctrine of equitable tolling applies in this case because Mr. Brown pursued his rights diligently and the extraordinary circumstance described above stood in his way. In the circumstances of this case, where arguably the motion may be deemed untimely as a result of mistake, error, excusable neglect, or even negligence, the reasoning of this Court's decisions in *Austin v. State*, 305 S.C. 453 (1991), *Odom v. State*, 337 S.C. 256 (1999), and *Wilson v. State*, 348 S.C. 215 (2002), requires that the one-year limitations period not apply in this case. A ruling on the merits regarding trial counsel's failure to litigate the sentencing hearing competently would prevent an unjust procedural defect and permit Mr. Brown to have his "right to one fair bite at the apple", *Wilson v. State*, 348 S.C. 215, 218, *i.e.* a full and fair PCR hearing on the merits. This is particularly true in this case where the record evidence at the PCR hearing demonstrates that an inexperienced lawyer neither possessed nor presented a viable trial defense although several existed including Mr. Brown's lack of knowledge of the contents and weight of the package containing the marijuana and the lesser-included offense of possession for personal use rather than for trafficking.

- II. The PCR court err in refusing to rule on the merits of the ineffective assistance of counsel claim pertaining to trial counsel's failure to investigate and challenge the use of two prior invalid convictions to unlawfully enhance the sentence when the evidence at the hearing demonstrated that counsel's deficient performance resulted in a mandatory 25-year sentence.

This Court has recognized that an attorney's failure to challenge the constitutionality of a conviction used to enhance a defendant's sentence can give rise to a claim of

ineffective assistance of counsel. *See Robinson v. State*, 380 S.C. 201, 669 S.E.2d 588 (2008). Moreover, counsel's failure to inform his client of the potential challenge of the use of an invalid conviction represents deficient attorney performance within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984). *Berry v. State*, 381 S.C. 630, 675 S.E.2d 425 (2009). Here, the record demonstrates that both convictions used to enhance the sentence are invalid, that trial counsel failed to conduct an adequate investigation and that he failed to discuss with his client the potential challenge to the use of the invalid convictions.

CONCLUSION

For the reasons stated, Mr. Brown respectfully asks this Court to grant the petition for a writ of certiorari.

Dated: January 7, 2015

Respectfully submitted,



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Supreme Court

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State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the PETITION FOR WRIT OF CERTIORARI & APPENDIX on the following person and entity by delivering a copy to Federal Express on January 9, 2015 for delivery to:

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