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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County
Perry M. Buckner, Circuit Court Judge
2011-CP-07-01538

Appellate Case No. 2014-002155

DEANGELO C. MICKELL, #350668,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

ASHLEY A. McMAHAN
Assistant Attorney General
SC Bar No. 71676

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3693

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

QUESTION PRESENTED

Did the PCR Court err in dismissing Petitioner's application and enforcing the written plea agreement where the Petitioner waived his rights to direct appeal and post-conviction relief?

STATEMENT OF THE CASE

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the State Grand Jury Clerk of Court. Applicant was indicted at the May 2009, term of the State Grand Jury for: Count I – Conspiracy to Traffic Cocaine Greater than 400g and Count XVII – Trafficking Cocaine 200 - 400g (2009-GS-47-0005). Applicant was represented by Anthony O. Dore, Esquire. On January 25, 2010, the Applicant pled guilty to Conspiracy to Traffic Cocaine 28-100g and Trafficking Cocaine 28-100g. Sentencing was deferred. On April 29, 2010, the Honorable Carmen T. Mullen concurrently sentenced him to confinement for a period of eighteen (18) years on both charges. Applicant did not appeal his conviction or sentence.

Petitioner filed an Application for Post-Conviction Relief on March 31, 2011. The Return was filed on September 28, 2012. Petitioner filed a Motion for Discovery on or about March 1, 2013. Respondent filed an Amended Return Motion to Dismiss on or about March 26, 2013. Petitioner filed a Motion to Deny the Respondent's Amended Pleading and a Motion to Compel Compliance with a Subpoena on or about March 28, 2013. A hearing into the Applicant's motions was convened on April 1, 2013, at the Beaufort County Courthouse. The Motions were denied on or about April 13, 2013.

A Motion to Quash Subpoena was then filed by Beaufort County on or about May 2, 2014, and SLED filed a Motion to Quash Subpoena on or about May 5, 2014. Petitioner responded to Beaufort's Motion to Quash also on May 5, 2014.

A hearing was convened via telephone on May 6, 2014 and the next day at the Colleton County Courthouse on May 7, 2014. The telephonic hearing related to the Motions to Quash, while the hearing in at the Colleton County Courthouse was related to Respondent's Motion to Dismiss. The Motions to Quash were granted on May 20, 2014.

The Respondent's Motion to Dismiss was granted on May 21, 2014. The

Petitioner filed a 59(e) Motion on or about June 2, 2014. Respondent replied on June 11, 2014. Petitioner's 59(e) Motion was denied on September 17, 2014. The Notice of Appeal was filed on October 8, 2014. Petitioner filed his Petition for a Writ of Certiorari on March 4, 2015. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The reviewing Court "gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). A PCR court's findings will be upheld on appeal if there is "any evidence of probative value sufficient to support them." Id. The appellate court must reverse where there is no probative evidence to support the findings. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

ARGUMENT

The PCR Court did not err in dismissing Petitioner's application and enforcing the written plea agreement where the Petitioner waived his rights to direct appeal and post-conviction relief.

Petitioner claims that he did not voluntarily waive his right to a PCR. The record refutes this assertion. A waiver of appellate and PCR rights will be held effective only if it is knowing and voluntary. Spoone v. State, 379 SC 138, 142, 665 SE2d 605, 607 (2008). In order to determine whether a waiver of the right to appeal and PCR is voluntarily, knowingly, and intelligently made, it is necessary to look at the particular facts and circumstances of the case including: 1. The background, experience, and conduct of the accused, 2 the text of the plea agreement, and 3 the transcript of the plea hearing. Id. at 143, 608.

Petitioner has a fairly sophisticated background. He graduated from high school, attended two years of college, and ran his own business. *See* App. p. 108, line 24 – p. 109, line 1; App. p. 110, lines 2-3. Certainly someone that can accomplish all this is intelligent enough to know how to read and comprehend, and know what type of agreement he is entering into. Secondly, the text of the plea agreement is straightforward. In reads in pertinent part: "...understands that he has a right to file a post-conviction relief (PCR) action in this case but agrees to knowingly and voluntarily waive any post-conviction relief action." App. p. 140, subpart 8. The agreement was signed by the Petitioner and his attorney. Supp. App. p. 1.

As for the third prong, the Court questioned the Petitioner about his waiver of PCR rights:

THE COURT: Sir, you understand that pursuant to your plea agreement,

you have waived any right to an appeal or a post-conviction relief filing. Do you understand that?

MR. MICKELL: Yes, ma'am.

THE COURT: You understand that we allow by contract for you to waive those constitutional rights. You understand that and you're willingly and freely doing that; is that correct, sir?

MR. MICKELL: Yes, ma'am.

App. p. 134, lines 9-17. This colloquy went even farther than the question of the court in the Spoone case. In Spoone, the Court asked if he knew he was giving up rights to have his case "further considered." Spoone at 141, 606. In Petitioner's case, the plea Court specifically asked if he was giving up his PCR rights and whether he was doing so willingly and freely.

The PCR Court was correct to rule that the record "speaks for itself" when it ruled that Petitioner waived his right to a PCR in his plea agreement and therefore should not be allowed to attack any voluntariness. "[This Court] believe[s] the transcript and the plea agreement adequately show an indication, under oath, by the [Petitioner] to waive any application for pots-conviction relief..." App. p. 45, lines 16-19. Based on the foregoing, Petitioner's waiver of the right to file a PCR was done knowingly and voluntarily and the PCR Court did not err in dismissing the application.

Laches Does Not Apply to the Respondent's Motion to Dismiss

Petitioner claims the doctrine of Laches bars the Respondent from being able to raise the issue that Petitioner waived his right to a PCR. This is simply incorrect. "Laches is an equitable doctrine that our courts have defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do

what in law should have been done." Jervey v. Martint Environmental, Inc., 396 SC 442, 451, 721 SE 2d 469, 474 (2012), *citing* Strickland v. Strickland, 475 SC 76, 85, 650 SE 2d 465, 470 (2007). "To establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches." Id. at 451. Respondent did not delay in asserting its right to move to dismiss and Petitioner cannot show prejudice in the delay in filing that motion.

Respondent initially filed its Return on September 28, 2012. Respondent filed its Amended Return Motion to Dismiss on or about March 26, 2013. The hearing on Respondent's Motion to Dismiss was not heard until May 8, 2014. While there was a time frame of approximately five months between the Return and the Amended Return, there was an even longer period - over a year - from the time the Amended Return was filed and the hearing on the Motion. It's disingenuous for the Petitioner to claim that he did not have adequate time to prepare for the Motion to Dismiss when almost a year past before it was heard. Therefore, the PCR Court was correct in its ruling when it stated that it doesn't "...believe there has been sufficient showing to me that the time alone was sufficient for me to say that the equitable doctrine of laches, unreasonable delay, should be applied here in this situation." App. p. 44, lines 22-25.[1]

[1] In Jervey, cited above, the court found laches applied after a 450 day delay. Id. at 452. In Historic Charleston Holdings, LLC v. Mallon, the court found laches applied after a "three-year plus" delay. 381SC 417, 433, 673 SE 2d 448, 456.

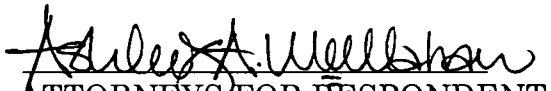
CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

ASHLEY A. McMAHAN
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

March 17, 2015

ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

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VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: **DeAngelo C. Mickell, #350668 v. State of South Carolina**
2011-CP-07-01538
Appellate Case No.: 2014-002155

Dear Mr. Shearouse:

Please find enclosed an original and six copies of the Respondent's Return to the Petition for Certiorari. Also enclosed is a Motion to Supplement, Supplemental Appendix, and a Certificate of Service.

Should you have any questions you can contact me at the number listed below.

Best regards,

Ashley A. McMahan
Assistant Attorney General

cc: James A. Brown, Jr., Esquire