

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Dorchester County
Maite Murphy, Circuit Court Judge

S.C. Supreme Court

RODNEY ELLIOTT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002323

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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ISSUE PRESENTED

Whether petitioner's 2007 post-conviction relief counsel was ineffective because he failed to respond to a conditional order of dismissal and failed to file an appeal of the order of dismissal in that matter?

STATEMENT

Petitioner was convicted of criminal sexual conduct with a minor in the second degree after a jury trial held before the Hon. Luke N. Brown on July 22-24, 1998, in Dorchester County. A twenty year sentence was imposed. Gene Dukes, Esq. was trial counsel. Margaret McDonald, Esq. was the assistant solicitor. (App. p.1-p.287).

Petitioner appealed his conviction and the appeal was dismissed by the Court Of Appeals on November 15, 2000, pursuant to a review under Anders v. California, 386 U.S 738 (1967) State v. Elliott, Op. No. 2000-UP-0684. (App. p.300).

Petitioner filed his current application for post-conviction relief on March 16, 2010. (App.p.288-297). Respondent filed a return and motion to dismiss on April 11, 2011, alleging the application was successive and that it failed to comply with the post-conviction relief statute of limitations. (App. p.300-p.308. Petitioner had alleged after discovered evidence. (App. p. 300-p. 308). A hearing was held on May 28, 2014, before the Hon. Maite' Murphy on the respondent's motion to dismiss and petitioner's allegation of after discovered evidence. Petitioner was present and was represented by Mark Archer, Esq. Respondent was represented by Megan E. Harrigan, Assistant Attorney General. (App. p309-p.329) on August 18, 2014, Judge Murphy issued an order denying and dismissing the application for post-conviction relief. (App. p. 330-p.336). A Subsequent Rule 59(e) motion was denied on September 29, 2014.

This petition follows.

ARGUMENT

Petitioner's 2007 post-conviction relief counsel was ineffective because he failed to respond to a conditional order of dismissal and he failed to file an appeal of the order of dismissal in that matter.

Petitioner alleged the following in his 2007 application for post-conviction relief:

“(a) The Applicant alleges that he was denied his Sixth Amendment right to the effective assistant of counsel where counsel failed to investigate and procure evidence that the Applicant did not have any sexually transmitted diseases which would have shown that he was not the perpetrator of the sexual offenses committed.

(b) The Applicant alleges that he should be permitted to raise this allegation in the present application where the evidence is after-discovered and if presented during trial, would have likely resulted in a verdict of not guilty.

(c) The Applicant alleges that he is entitled to raise this allegation in the present application based on an intervening decision by the United States Supreme Court which held that a criminal defendant is denied due process where forensic evidence discovered after trial would show that he is actually innocent of the crime which he is convicted.” (Supp. App. P. 70)

Respondent alleged in her return and motion to dismiss that the current application should be summarily dismissed because it was successive to a prior application for post-conviction relief. Respondent also alleged that the application should also be summarily dismissed for failing to comply with the post-conviction relief statute of limitations. Finally, respondent noted that petitioner alleged newly discovered or after discovered evidence. To meet the test for after discovered evidence a defendant must show that the evidence:

(1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

(Supp. App. p. 90-p. 94).

Respondent stated that petitioner had “not shown that the alleged evidence meets any of the requirements for after-discovered evidence. Most importantly, the [petitioner] raised this allegation in his previous application for post-conviction relief and on an appeal from the denial of his prior application.” (emphasis in original) (Supp. App. p. 94.)

In McCoy v. State, 401 S.C. 363, 739 E. 2d, 623 (2013) the court wrote:

“The [PCR] court may grant a motion by either party for summary disposition of the [PCR] 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). When considering the State’s motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. Leamon v. State, 363 S.C. 432, 434, 611 S.C.2d 494, 495 (2005) (citing S.C. Code Ann. § 17-27-80). Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing. *Cf. Delaney v. State*, 269 S.C. 555, 556, 238 S.E. 2d 679, 6479 (1977)’.

In Odom v. State, 337 S.C. 256, 523 S.E. 2d 753 (1999) the court held that a petitioner was entitled to an evidentiary hearing on the issue of whether he knowingly and intelligently

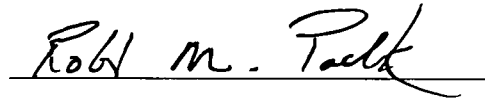
waived his right to appellate counsel after his prior application was summarily dismissed. The one year statute of limitations did not apply to this situation. In Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) the court held that PCR counsel can be held ineffective for failing to appeal the denied of post-conviction relief. In this case, PCR counsel failed to appeal the denial of the 2007 PCR application. He also failed to respond to the conditional order of dismissal.¹ A successive application is not to be summarily dismissed when prior PCR counsel has failed to appeal an order of dismissal.

¹ This court has not determined if a PCR counsel can be ineffective for failing to respond to a conditional order of dismissal. The failure to respond could be considered a procedural bar to the failure to appeal claim of an order of dismissal.

CONCLUSION

Petitioner's writ should be granted and his case should be remanded for an evidentiary hearing.

Respectfully submitted,

A handwritten signature in black ink, reading "Robt M. Pachak", is written over a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of April, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
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RODNEY ELLIOTT,

PETITIONER,

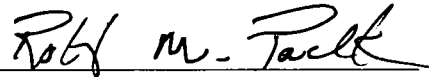
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE


I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan Jameson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Rodney Elliott, #251337, Macdougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 22nd day of April, 2015.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of April, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.