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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Cherokee County

Roger L. Couch, Circuit Court Judge

DUSTON LENIER ROGERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002626

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

The PCR judge erred in dismissing petitioner's second PCR application as successive and in characterizing the claim listed in that second action as lacking in specificity when petitioner was available at the PCR hearing to testify in reference to the details of his complaint of juror misconduct, and because the successiveness doctrine did not apply to his juror misconduct claim.

STATEMENT

Petitioner Duston Lenier Rogers was convicted of possession with intent to distribute crack cocaine and unlawful possession of a pistol during the April 2007 term of the Cherokee County General Sessions Court before Judge J. Derham Cole, who sentenced him to an aggregate term of fifteen years. App. 1 – 149. Edward A. Lamb represented petitioner at trial, and Assistant Solicitor Alex R. Stalvey appeared on behalf of the state. Petitioner appealed, but his case was dismissed by the South Carolina Court of Appeals. See State v. Rogers, 2009-UP-136 (S.C. Ct. App. filed March 10, 2009). Petitioner was represented on appeal by Lanelle C. Durant, Esquire, of the South Carolina Office of Appellate Defense.

Petitioner's first PCR application was filed with the Cherokee County Courthouse on August 24, 2009. A PCR hearing was convened at the Cherokee County Courthouse on May 24, 2010, before Judge J. Mark Hayes II. Stanley T. Case represented petitioner at the PCR hearing. On July 28, 2010, Judge Hayes issued an Order denying petitioner's PCR action. Petitioner appealed, but his appeal was denied per written Order dated March 7, 2013, by the South Carolina Court of Appeals. App. 158.

Petitioner's second PCR action was filed on October 26, 2012, with the Cherokee County Office of the Clerk of Court. App. 151 – 162. The respondent filed a return and motion to dismiss on the ground that second application was successive and that petitioner's claim of juror misconduct at his trial lacked specificity with respect to the grounds that would entitle him to relief. App. 157 – 162. A PCR hearing was convened on September 17, 2014, at the Cherokee County Courthouse before Judge Roger L. Couch in response to the filing of petitioner's second PCR action. App. 165 – 171. Petitioner was present at the hearing and represented by Leah B. Moody, and Assistant Attorney General J. Clayton Mitchell appeared on behalf of the state. During the PCR hearing,

Judge Couch entertained the state's motion to dismiss and requested that petitioner comply within thirty days of the hearing to the state's request for specificity with regard to his PCR claim of "newly discovered evidence of juror misconduct and impartial jury." App. 168 – 171. Petitioner did not submit the requested response as required by PCR judge. On November 2, 2014, Judge Couch issued an order of dismissal in the case therein denying PCR relief on the grounds that petitioner's second PCR was successive and because petitioner failed to "amend his application to provide specific grounds [in support of his PCR juror misconduct] allegation." App. 176 – 177.

Petitioner appealed Judge Couch's Order. This brief follows.

ARGUMENT

The PCR judge erred in dismissing petitioner's second PCR application as successive and in characterizing the claim listed in that second action as lacking in specificity when petitioner was available at the PCR hearing to testify in reference to the details of his complaint of juror misconduct, and because the successiveness doctrine did not apply to his juror misconduct claim.

At trial, Officer Christie Poole testified that he received information on September 6, 2006, from a confidential informant that a particular green vehicle being driven by Billy Rogers would appear in a designated area in town and that two other individuals, one of whom would be petitioner, could be found inside the vehicle. Officer Poole stated that he stopped the vehicle in question and asked petitioner to step out of the vehicle; and that upon doing so, a handgun was seen protruding from petitioner's back pocket. Officer Poole explained that he responded by handcuffing petitioner for the gun possession and that in the process of doing so, petitioner "laid a glassine bag containing a yellow-white rock-like substance on the top of the car." App. 11, l. 2 – p. 14, l. 10; App. 51, l. 5 – p. 59, l. 15. SLED chemist Kukila Stanley testified that the substance in petitioner's possession was 8.07 grams of cocaine based crack. App. 91, lines 7 – 25.

In petitioner's second PCR application, he alleged "newly discovered evidence of juror misconduct and impartial jury." During the PCR hearing, no testimony was taken. Rather, the PCR judge entertained the respondent's motion to dismiss based on the ground that petitioner's newly discovered juror misconduct allegation was non-specific. App. 168, l. 6 – p. 169, l. 19. PCR counsel apprised the PCR judge of the fact that "[petitioner was] able to testify" at the hearing about the juror misconduct claim, but the PCR judge did not allow any testimony regarding the matter to be presented at that time. App. 170, l. 14 – 16.

The PCR judge subsequently issued an Order of Dismissal denying PCR relief on the ground that petitioner's second PCR action was successive and contained an issue that lacked specificity and that as a result, the same was dismissed. App. 175- 178.

A.) Error in Failing to Hold A PCR Hearing

If a PCR applicant makes a claim that is not conclusively refuted by the record, then a PCR hearing must be held in the case. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983). Here, petitioner's claim of juror misconduct was recently uncovered. Such a claim of jury misconduct could not be refuted by the record. Therefore, a PCR hearing should have been held in the matter. Also, in McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013), the Court held that in the context of PCR allegations of juror misconduct, the newly discovered evidence test is no longer applicable and should not be used to justify summary dismissals on these issues, but rather such claims should be analyzed as outlined in State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001), via a case by case basis after a hearing into the matter. In Woods, the Court held that a separate standard applies in juror misconduct cases to the extent that findings must be made as to whether a juror intentionally concealed information, and if a challenge for cause or a peremptory challenge would have been made had the information been revealed. Here, a hearing should have been conducted in

petitioner's instant PCR action where he raised a juror misconduct claim. Additionally, note that the Court reversed in McCoy and held that the PCR judge erred in summarily dismissing petitioner's PCR action where he raised a juror misconduct complaint because genuine issues of fact existed as to whether this was successive, and the Court went on to remand the case for a hearing on his juror misconduct claim.

B.) Successiveness Rationale

Additionally, the PCR judge erred in ruling that petitioner's instant and second PCR action was successive and dismissible as such. Successive PCR actions are not entertained unless the applicant can establish a new ground that could not have been raised in a previous PCR action. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981). In his PCR application, petitioner framed the juror misconduct claim as "newly discovered evidence," but the more accurate reading should be that the claim of juror misconduct was just recently uncovered. And again, as held in McCoy, supra, the newly discovered evidence test in connection with the timeliness factor in assessing a juror misconduct claim has been supplanted by the juror misconduct test announced in Woods where a hearing into the matter must be held before an adjudication on the issue can be pronounced.

C.) Lack of Specificity

Finally, the PCR judge ruled that petitioner's "juror misconduct" claim did not "sufficiently plead a claim showing that he was entitled to relief....pursuant to Rule12(b)(c)(6), SCRPC." App 177. However, to the contrary, petitioner was available at the PCR hearing and ready to testify regarding his newly discovered claim had the PCR judge allowed the testimony.¹ However, the PCR judge did not allow petitioner to testify at that time.

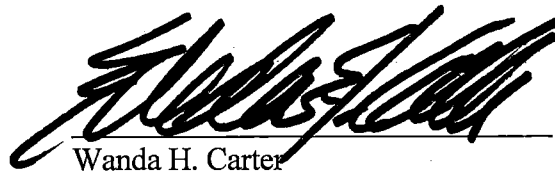
¹ During the PCR hearing, PCR counsel informed the PCR judge that petitioner was able to "testify [during the hearing] today" on the issue of juror misconduct. App. 170, lines 14 - 16

In the case at bar, the PCR judge erred in dismissing petitioner's PCR action as successive and non-specific, and in failing to hold a PCR hearing per Sharper and Woods regarding petitioner's claim of juror misconduct that was recently uncovered.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of May, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Cherokee County
Roger L. Couch, Circuit Court Judge

DUSTON LENIER ROGERS,

PETITIONER,

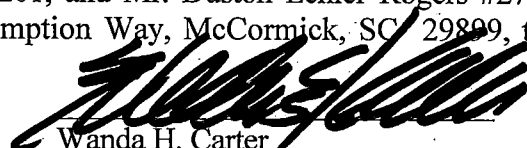
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

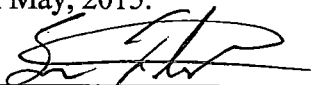
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Duston Lenier Rogers #279924, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 20th day of May, 2015.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of May, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.