Original

IN THE SUPREME COURT
STATE OF SOUTH CAROLINA

Ernest Battle,# 165247)
)
Petitioner,)
)
V.)
)
State of South Carolina,)
)
Respondent.)
)

APPELLATE CASE NO. 2015-001214
WRITTEN EXPLANATION, PURSUANT
TO SCACR-RULE 243(c)

Now, comes the Petitioner, Ernest Battle,# 165247, respectfully submit in support of his notice of appeal in the above captioned case, a WRITTEN EXPLANATION, pursuant to SCACR-Rule 243 (c).

Respectfully submitted,
S/ Ernest Battle
Ernest Battle # 165247

SUFFICIENT FACTS

On April 7, 1979, applicant was stopped while driving his vehicle. He was advised that he was under arrest pursuant to an arrest warrant for simple possession of marijuana. While conducting a search of petitioner's car, a .32 Cal. pistol was found. Petitioner was arrested and tooken to the Charleston Couty jail. Instead of being allowed to pay a fine for the offenses, a bond was set in the amount of three (3) thousand dollars for the pistol and a two (2) thousand dollars for the marijuana, although the statue clearly permits the petitioner to pay a fine. Petitioner was released from jail after serving a period of (45) days following the April 7 arrest. After Petitioner was released upon service of (45) days for the April 7, 1979 arrest, he was again arrested on August 6, 1979 on a bench warrant for failure to appear in Magistrate's court on May 7, 1979 for the April 7, 1979 arrest. Three days after Petitioner's August 6, 1979 arrest, he was brought to the Charleston Court of General Sessions, before the Honorable Klyde Robinson. Petitioner was represented by Aaro Harvey, Esq. When the bench warrant was issued for Petitioner's arrest for failure to appear in magistrate's court on May 7,1979, he was infact in the Charleston County jail serving the (45) days for the same April 7, 1979 arrest. On August 9, 1979, Petitioner's attorney, Aaron Harvey, coersed petitioner to plead guilty to two (2) counts of unlawful drugs-marijuana (1979 GS-10-1111,-1112),and one count (1), of unlawful possession of a weapon (1979-GS-10-704). On August 9, 1979, petitioner was sentenced under the Youthful Offender Act 5(c) by the Honorable Klyde Robinson to confinement for a period of three (3) years for each count. the sentences were to be served concurrently. The Petitioner made a timely request to his attorney to file a notice of appeal, but his attorney failed to do so, thus depriving the petitioner of his right to appellate review. Petitioner's August 9, 1979 marijuana convictions were used for enhancement purposes of his current conviction, although the the August 9, 1979 marijuana convictions were barred under double jeopardy and all exceeded the statutory punishment and sentence authorized by law.

ARGUMENT

The Petitioner would respectfully show this Honorable Court that there is an arguable basis for asserting that the determination by the lower court was improper based on the following facts and legal authority of law.

In his application for post-conviction relief, Petitioner alleges that he is being held in custody unlawfully for the following reason (s).

1. That his sentences and convivtions were excessive and unlawful.
2. That his sentences and convictions were barred by double jeopardy.
3. Unlawful Enhancement.
4. That the court abused its discretion.
5. Ineffective Assistance of trial counsel.

The PCR judge issued a final order dismissing Petitioner's PCR application without conducting an evidentiary hearing barring his application as being successive and/or as being untimely under the state of limitations.

While the PCR judge finds that the Petitioner is argubly correct in his assertion that his application would not be barred by the statue of limitation on the issue of whether he knowingly and intelligently waived his right to a direct appeal, but fails to acknowledge that he would be barred by laches is not only conflicting with other authorities of law, but would constitute a grave miscarriage of justice.

In Petitioner's first claim he alleges that not only were his 1979 sentences and conviction excessive but they were also unlawful.

Petitioner was indicted and plead upon erroneous advice of his trial counsel to two (2) counts of simple possession of marijuana/unlawful drugs. (1979-GS-10-1111,-1112), and one (1) count of unlawful possession of a weapon. (1979-GS-10-704). The statutory offense for which petitioner was indicted on

the two (2) counts of marijuana, § 44-53-370 (d)3, and the weapons offense, § 16-23-20, read as follows:

Title § 44-53-370 (d)3.

.....That any person who violates this subsection with respect to twenty eight grams or one ounce or less of marijuana or ten grams or less of hashish shall be subjected to imprisionment for a term not to exceed thirty days or a fine of not less than one hundred dollars nor more than two hundred dollars.

See S.C. Jur. Prud. Magistrates and Municiple Judges § 19. Exclusive vs. Concurrent Jurisdiction..

Magistrates and, by implication, the municiple judges have exclusive jurisdiction over all criminal cases in which the punishment does not exceed a fine of $ 200 or imprisonment for 30 days.

Title § 16-23-20 Unlawful carrying of a pistol (see Section 16-23-50)(A)(2).. read as follows:

A person violating the provisions of Section 16-23-20 is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprison not more than one year or both.

All of petitioner's sentences exceeded the the maximum punishment or penalty authorized or prescribed by law pursuant to the statory provisions and legislative intent. Petitioner's sentence was unconstitutional and illegal because courts may not prescribe greater punishment than the legislative intended. See; Rutlege v. U.S. 116 S.Ct. 1241, 517 U.S. 292, 134 L.Ed. 2d 419 F.3d 632; Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225; Sentance may not exceed maximum statutory limit. U.S. v. Collins, 40 F.3d 95, 115 S.Ct. 1986, 514 U.S. 1121.

Convicted defendant may move to correct an"illegal sentence" at any time following the conviction. U.S. v. Pavlico, 961 F.2d 440, 443 (4th Cir.)

A sentence is illegal if it exceeds the statue under which the charge was lodged or, ifi other words is one which the judgement of conviction does not authorize. U.S. v. Savely, 814 F.Supp. 1519 (D.Kans.) U.S. v. Morgan, 346 U.S. 510, 506, 74 S.Ct. 347, 250, 98 L.Ed.2d 248 (1954).

Besides the sentences and convictions being excessive and unlawful, petitioner's marijuana convictions were used for enhancement purposes in his current sentence. He alledged in his PCR applivation that he was suffering from the results of his prior 1979 marijuana convictions. Our South Carolina Supreme Court held in McDuffie v. State, S.C. 229, 227 S.E.2d 595 (1981), that although the sentence has been fully served, if the applicant for post-conviction relief alledges that the results of his prior conviction still persists and he is continuing to suffer from the effects, he is entitled to an evidentiary hearing to determine whether or not he is prejudiced. See also Jackson v. State, 489 S.E.2d 915 (S.C.1997); U.S. v. Gernie, 228 F.Supp. 329, 332 (D.C.S. N.Y.), quoting from U.S. v. Morgan, 346 U.S. 512-513, 74 S.Ct. 247, 253(1958).

Morgan supra held:

"[T]he case is not considered moot merely because sentence has been completed, and the court has the power to vacate and set aside an illegal conviction and sentence if the proceeding is well grounded."

" We hold where an applicant for post-conviction relief alledges in his application that the results of his prior conviction still persist, even though the sentence has been fully served, he is entitled to anevidentiary hearing to determine whether or not he has been prejudiced.

See also; Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 $@$$ (2002), in which the South Carolina Supreeme Court held:

Statue of limitations does not apply when an applicant in a post-conviction alledges that he did not knowingly and intelligently waived his right to a direct appeal from his criminal conviction. This is not so much an exception to the Statue of Limitation, but rather a situation in which the statue

of limitation does not apply. In Wilson supra, the defendant was tried and convicted of armed robbery and sentenced to thirty years confinement in the Department of Corrections. Wilson did not direct review. Rather, he claimed that he instructed his trial attorney to appeal his conviction, but the trial attorney failed to do so. Nearly 2 years later Wilson filed a PCR alledging ineffective assistance of counsel in several respects.

The PCR judge dismissed the petition as untimely, on appeal the South Carolina Supreme Court reversed, holding that the state of limitation does not apply when anapplicant alledges that he did not knowingly and intelligently waived his right to directa ppeal from his conviction.

The Court explained:

> A defendant has the procedural right to one fair bite at the apple. That is every defendant has a right to file a direct appeal and one PCR application. In this case Wilson has not had "one bite at the apple" since he has not recieved either a direct appeal from his conviction or a PCR hearing.

The Petitioner argues that he too has that procedural right as Wilson to "one fair bite at the apple" since he also like Wilson, has not recieved either a direct appeal or a PCR hearing.

DOUBLE JEOPARDY

When Petitioner was arrested on the April 7, 1979 bench warrant for simple possession of marijuana and served a period of (45) days for the offense, and then re-arrested and erroneously coerced and advised by his trial counsel to plead guilty to the same offense for which he had already been punished, constituted double jeopardy.

The double jeopardy clause protects against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offens after conviction; and (3) multiple punishments for the same offense. U.S.C.A. Amend. 5,14 S.C. Const., Art. I. § 12. State v. Gordon, 588 S.E.2d 105, 356 S.C. 153 (2000); State v. Nelson, 519 S.E.2d 786, 336 S.C. 186 (1999).

Where double jeopardy plea is against successive prosecutions, double jeopardy serves the purpose of providing criminal defendants with a measure of finality and response, and guarantees that an accused who has once stood the ordeal of criminal prosecution through to judgement, whether of conviction or acquittal shall not be required to run the gauntlet of a trial or plea again for same offense alledged. U.S.C.A. Const. Amend. 5., U.S. v. Ragins, F.2d 1184, on remand 702 F.Supp. 1249

The respondent pleads the doctrine of "laches."
Laches is an equittable doctrine, which "arises upon the failuee to assert a known right." Ex parte Stokes, 256 S.C. 260, 182 S.E.2d 306 (1971).

Laches is defined as:

Neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do in law what should have been done. Whether claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury , prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches. Arceneaux v. Arrington, 327 S.E.2d 357 (S.C. App.1985); Hallum v. Hallum, 296 S.C. 195, 198-99, 371 S.E.2d 525, 527 (1988). See also ; Odum v. State, 377 S.E.2d 256.

There is no way that Petitioner could have known that years later his 1979 marijuana convictions would be used aginst him for enhancement purposes and that he would continue to suffer from the results of it... The State would not suffer any prejudiced or disvantage by consenting to an evidentiary hearing, of which the Petitioner is clearly entitled.

CONCLUSION

Based on the foregoing reasons, facts, and law, the Petitioner submits that there is an arguable basis for asserting that the determination by the lower court was improper.

State of SC County of Berkeley
The foregoing instrument was acknowledged before me
this 22nd day of June, 2015,
by Ernest Battle
Lisa M Cross Notary Public,
My Commission Expires Jan 16, 2024

LISA M. CROSS
Notary Public, State of South Carolina
My Commission Expires 1/16/2024

Respectfully submitted,

S Ernest Battle

Ernest Battle/165247

AFFIDAVIT OF SERVICE

I, Ernest Battle # 165247, being duly sworn, dispose and says that the information contain, is true and correct to the best of my ability. That on June 22, 2015, I forwaded for filing One (1) original Written Explanation pursuant to SCACR-Rule 243(c) to Honorable Daniel E. Shearouse/Clerk of the Supreme Court of South Carolina, along with an affidavit of service to the office of the Attorney General, J. Rutledge Johnson at the below listed address: Postage prepaid first class, U.S. Mail. And a true copy.

Office of the Attorney General
J. Rutledge Johnson
Assistant Attorney General
Post Office Box 11549
Columbia, S.C. 29211-1549

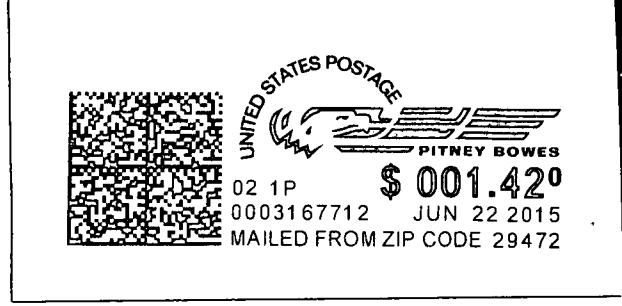
Respectfully submitted,
S Ernest Battle
Ernest Battle/165247

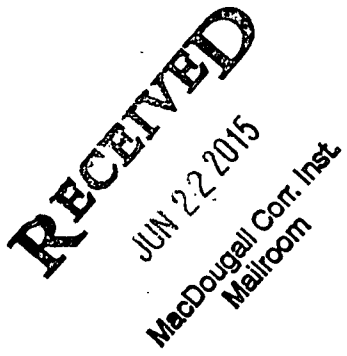
State of SC County of Berkey
The foregoing instrument was acknowledged before me
this 22nd day of June, 2015.
by Ernest Battle
Lisa M Cross Notary Public
My Commission Expires Jan 16, 2024

LISA M. CROSS
Notary Public, State of South Carolina
My Commission Expires 1/16/2024

RECEIVED
JUN 25 2015
S.C. SUPREME COURT

Mr. Ernest Battle #165247
MacDougall Corr. Inst.
1516 Old Gilliard Rd.
Ridgeville, S.C. 29472
Birch Unit-A-18





To: The Supreme Court of South Carolina
Honorable Daniel E. Shearouse/Clerk
Post Office Box 11330
Columbia, S.C. 29211