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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
JUL 06 2015
SC Court of Appeals

Appeal from Richland County

Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN JULIUS SMITH,

APPELLANT.

APPELLATE CASE NO. 2014-001366

RETURN TO MOTION TO STRIKE PORTIONS OF APPELLANT'S INTIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL AND TO HOLD IN ABEYANCE

In opposition to the State's Motion to Strike and Hold Appeal in Abeyance, counsel for Appellant John Julius Smith respectfully states as follows:

1. The State contends that portions of Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal are improper. Specifically, the State moves to strike:

a. The portion of the Statement of the Case, page 4, referring to Appellant's application for post-conviction relief, evidentiary hearing, and order of dismissal;

b. The portion of the Statement of the Case, page 5, referring to Appellant's writ of mandamus and the resulting actions by our Supreme Court;

c. The portion of the Argument under Issue I, pages 14-15 and including footnotes 7 and 8, referring to Appellant's post-conviction relief hearing and post-conviction relief hearings in general; and

d. The second item listed in the Designation of Matter to be Included in the Record on Appeal, which is the Order of Dismissal of Appellant's application post-conviction relief dated September 7, 2011.

2. Rule 208(b)(1)(C), SCACR, provides that the Statement of the Case "shall contain, as a minimum, the following information: . . . the date of and description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal, or may throw light upon the questions involved in the appeal." Contrary, to the State's assertion, the concise paragraphs regarding Appellant's post-conviction relief action and writ of mandamus were not included "to confuse the sole issue presented on appeal." Rather, they were included to give this Court a full understanding of the relevant procedural history of the case.

3. As will be discussed below, the post-conviction relief proceedings are relevant to this action for several reasons such that there inclusion in the Statement of the Case and Argument were proper.

First, the inclusion of the brief procedural history of the post-conviction relief application, hearing, and dismissal was necessary to provide this Court with a complete and accurate procedural history of the case.

Second, the post-conviction proceedings were discussed during the Rule 29(b) motions hearing. Tr. 5 and 11 – 14.

Third, it was during the PCR hearing that Appellant first learned of the after-discovered evidence – documents showing that the alleged injuries to the minor child were not as severe as indicated at the plea and sentencing hearing. The timing of the discovery of this information is important because an after-discovered evidence motion must be filed "within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence." Rule 29(b), SCRCrimP; see also State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999) ("[A]ppellant must show the after-discovered evidence: (1) is such that it would probably change the result if a new trial were granted; **(2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial;** (4) is material; and (5) is not merely cumulative or impeaching." (emphasis added)).

Fourth, the State argued during the Rule 29(b) motion hearing that Appellant's motion was not proper because he pled guilty. Assistant Solicitor Arant specifically argued that Appellant's claim should have been brought under the Uniform Post-Conviction Relief Act, cited to the Act, and argued that Appellant exhausted all of his remedies. Tr. 23, l. 22 – 25, l. 6. After motions counsel responded, the PCR court heard the merits of the motion and ultimately issued a ruling on the merits. Tr. 25, l. 16 – 26, l. 16. However, Rule 220(c), SCACR, permits the appellate court to "affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Thus, it was necessary that Appellant address the solicitor's procedural argument and point out the inequity that would result were this Court to deny his appeal on this ground.

Fifth, the first issue argued in Appellant's Initial Brief is "whether Appellant's case should be remanded for an evidentiary hearing and findings of fact in light of the intervening case of Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014), which articulated a new test for relief sought based on newly discovered evidence following a guilty plea." Because Jamison's holding related specifically to applications made under the PCR Act, the decision left unclear what applicability, if any, this new test has to a motion for new trial made under Rule 29(b) by a defendant who pled guilty. Thus, it was necessary for Appellant to explain why Appellant filed under Rule 29(b) and point out the similarities between the after-discovered evidence provisions in both Rule 29(b), SCRCrimP and S.C. Code Ann. § 17-27-45(C).

4. Appellant's writ of mandamus and the resulting actions by our Supreme Court were known to the PCR court, as the Supreme Court's Order was referenced during the Rule 29(b) motions hearing. Tr. 14, ll. 20-24. The information regarding the petition for writ of mandamus and subsequent actions of our Supreme Court were all gleaned from the Supreme Court's Mar. 10, 2014 Order, a copy of which was sent to the Richland County Clerk or Court and to the solicitor's office. The State does not contend that the Supreme Court's March 10, 2014 Order was not a part of the lower court's file. Further, it would be a misrepresentation to this court to omit the information regarding what occurred in the interim period between Appellant's filing of his Rule 29(b) motion on August 7, 2012, and the evidentiary hearing on the motion on April 3, 2014. This information also illustrates, in one paragraph, that Appellant did not sit idly on his rights, but instead zealously pursued his motion. It is thus relevant to any laches defense that the State may attempt to raise on appeal.

5. The withdrawal of Appellant's PCR was discussed at the hearing. Tr. 11, ll. 16-25. This Court can certainly take judicial notice that the Order of Dismissal, finding Appellant

made a knowing and voluntary decision to withdraw his PCR application. Further, Appellant notes that the PCR Order of Dismissal is referenced one time in Appellant's Initial Brief, on page 4 of the Statement of the Case. Again, Rule 208(b)(1)(C), SCACR, provides that the Statement of the Case "shall contain, as a minimum, the following information: . . . the date of and description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal, or may throw light upon the questions involved in the appeal."

6. Respondent avers that Appellant's inclusion of the above information in the Initial Brief was in an effort to confuse the Court and garner sympathy. Far from it, Appellant's intention was to provide this Court with a complete picture of what is admittedly a somewhat convoluted procedural history. As far as references to the ineffectiveness of PCR counsel, the same information was discussed at the Rule 29(b) motions hearing. While arguments related to equity may seem like pleas for sympathy to the State, the two are not synonymous.

7. In light of the above, no amendment to the Appellant's Initial Brief is necessary and Appellant's case should not be further delayed by an abeyance during the pendency of Respondent's frivolous motion to strike.

WHEREFORE, the undersigned counsel respectfully requests that this Court **deny** Respondent's Motion to Strike and Request for Abeyance.

Respectfully submitted,

Laura R. Baer

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of July, 2015.

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Brooks P. Goldsmith, Circuit Court Judge

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APPELLATE CASE NO. 2014-001366

CERTIFICATE OF SERVICE

I certify that a true copy of the Return to Respondent's motion to strike portions of appellant's initial brief and designation of matter to be included in the record on appeal and to hold in abeyance in the above case has been served upon Deborah R. J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of July, 2015.

Laura R. Baer
Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 6th day
of July, 2015.

Bailey Walfe (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.