

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Cherokee County
The Honorable J. Derham Cole, Judge
Appellate Case No. 2014-000595

Frazier Williams, #227393,

Appellant,

vs.

State of South Carolina,

Respondent.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General
SC Bar No. 78225

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. The court did not err when it denied Appellant's motion for recusal.
2. The court did not abuse its discretion when it dismissed Appellant's Writ of Mandamus without a hearing, when Appellant was using the Writ as a method to circumvent the procedural bars to successive post-conviction relief proceedings.

STATEMENT OF THE CASE

The Appellant is presently confined in the South Carolina Department of Corrections. The Appellant was indicted by the Cherokee County Grand Jury for murder (95-GS-11-0477), armed robbery (95-GS-11-0476), and first-degree burglary (96-GS-11-0475). Donald Leterer, Esquire, represented the Appellant. The Appellant proceeded to trial where he was found guilty of all charges by a jury. On October 30, 1995, the Honorable J. Derham Cole sentenced him to confinement for life for murder, life for first-degree burglary, and 25 years for armed robbery. All the sentences were concurrent.

A timely appeal and brief pursuant to Anders v. California, 286 U.S. 738 (1967), was filed on Appellant's behalf. The South Carolina Court of Appeals confirmed Appellant's convictions and sentences. State v. Williams, Op. No. 27-MO-101 (filed October 19, 1997). The Remittitur was returned on November 19, 1997.

Petitioner subsequently filed an application for post-conviction relief (PCR) on November 4, 1998. An evidentiary hearing was held on August 13, 2002, at which the Petitioner was present and represented by William Winter, Esquire. The Honorable Gary E. Clary denied and dismissed Petitioner's application by written Order on September 26, 2002.

A timely Notice of Appeal was filed on the Petitioner's behalf and Wanda H. Haile, of the South Carolina Office of Appellate Defense, submitted a Johnson Petition for Writ of Certiorari. The South Carolina Supreme Court denied the Petition on August 20, 2003. The Remittitur was issued September 5, 2003.

Appellant filed a Petition for Writ of Habeas Corpus with the United States District Court of South Carolina on October 4, 2004. The Petition was dismissed on April 21, 2005. Appellant requested a certificate of appealability, which was dismissed on November 2, 2005. Appellant

also filed a Petition for Writ of Certiorari to the United States Supreme Court, which was denied on June 26, 2006.

Appellant then filed a document captioned, "Petition for Writ of Habeas Corpus," with the Cherokee County Clerk of Court on October 11, 2006. The Respondent made its Return and Motion to Dismiss on or about March 16, 2007. A hearing on the State's motion was convened on September 18, 2007, at the Spartanburg County Courthouse. The Petitioner was not present at the hearing, but was represented by N. Douglas Brannon, Esquire. S. Prentiss Counts, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. The Honorable Roger L. Couch summarily dismissed the petition on December 14, 2009, for failure to sufficiently allege that Petitioner had exhausted all available post-conviction relief (PCR) remedies and for failure to allege sufficient facts to show why other remedies, such as PCR, are unavailable or inadequate.

Appellant filed a timely notice of appeal following the dismissal of his Petition for Writ of Habeas Corpus. The appeal was dismissed on May 27, 2010. The Remittitur was received on August 17, 2010.

Appellant then filed a document on or about June 6, 2013, with the Cherokee County Clerk of Court, and captioned "Motion for Writ of Mandamus." On October 29, 2013, the lower court denied the Appellant's request to proceed in forma pauperis with his Writ of Mandamus because the Writ lacked merit and was not the proper method for seeking the relief requested. Appellant filed a Motion for Recusal and to Vacate the Order. The court denied both motions by written Order filed and served March 5, 2014. Appellant filed a Notice of Appeal on April 3, 2014, and an Initial Brief of Appellant. Respondent filed an Initial Brief of Respondent and this Final Brief of Respondent follows.

ARGUMENT

1. The court did not err when it denied Appellant's Motion for Recusal.

Appellant has alleged that the Honorable J. Derham Cole should have recused himself from ruling on the Appellant's Petition for Writ of Mandamus and request to proceed in forma pauperis because Judge Cole was the trial judge for Appellant's 1995 conviction and sentence. Appellant argues that Floyd v. State, 303 S.C. 298, 299, 400 S.E.2d 145, 146 (1991), which held that "in all post-conviction relief hearings . . . a judge shall, upon motion, recuse himself if he was the judge who presided at the guilty plea, criminal trial, or probation revocation proceeding for which relief is being sought," applies to this matter. However, as noted in the Statement of the Case, not only was this matter not filed as a post-conviction relief application, but there was not a hearing scheduled. Further, the South Carolina Supreme Court has declined to extend the Floyd decision, finding no error when the post-conviction hearing judge denied Appellant's motion for recusal at Appellant's retrial following remand. State v. Watkins, 406 S.C. 360, 363, 752 S.E.2d 261, 262 (2013).

Respondent submits that the court did not err when it denied Appellant's Motion for Recusal. (ROA p. 9-10). Appellant failed to establish a showing of bias or prejudice stemming from an extra-judicial source and resulting in a decision based on information other than what the judge has learned from his participation in the case as a judge. State v. Jackson, 353 S.C. 625, 578 S.E.2d 744 (S.C. Ct. App. 2003). Appellant offered no information to support his claim that Judge Cole should recuse himself. "It is not enough for a party seeking disqualification to simply allege bias or prejudice. The party must show some evidence of that bias or prejudice." State v. Jackson, 353 S.C. 625, 627, 578 S.E.2d 744, 745 (Ct. App. 2003).

Therefore, the court did not err when it denied Appellant's Motion for Recusal.

2. The court did not abuse its discretion when it dismissed Appellant's Writ of Mandamus without a hearing, when Appellant was using the Writ as a method to circumvent the procedural bars to successive post-conviction relief proceedings.

Respondent submits that the court did not abuse its discretion in summarily dismissing the Appellant's Petition, along with the motion to proceed in forma pauperis. (ROA p. 7-8). To secure a writ of mandamus requiring the performance of an act, Appellant must show a duty of the respondent to act, the ministerial nature of the act, the specific right for which discharge of the duty is necessary, and lack of another adequate remedy. Porter v. Jedziniak, 334 S.C. 16, 512 S.E.2d 497 (1999). The act demanded in this case is not ministerial. Appellant argued in the Petition for Writ of Mandamus that the lower court should reverse, vacate, and dismiss his convictions and sentences because his indictments were not presented to the grand jury during a term of general sessions. (ROA p. 6). Appellant simply seeks another PCR hearing. The South Carolina Supreme Court has held that, "[w]hen the legal right is doubtful, or the performance of duty rests in discretion, or when there is another adequate remedy, a writ of mandamus cannot rightfully be issued." City of Rock Hill v. Thompson, 349 S.C. 197, 563 S.E.2d 101 (2002).

The Respondent submits the claims raised by the Appellant are appropriate for PCR, which can be considered as "another adequate remedy," but as Appellant has been unsuccessful in pursuing post-conviction relief, and these claims would likely be barred as successive and untimely in PCR, he is now attempting to circumvent the procedural bars in PCR by bringing these claims as a Petition for Writ of Mandamus.

Successive applications for post-conviction relief are clearly disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an Appellant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelli-

gently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the Appellant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an Appellant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "**could not have been raised . . . in the previous application.**" [Emphasis in original]. Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Appellant could have raised these allegations in a previous application, then the Appellant may not raise those grounds in successive applications. Id. The Appellant bears the burden of showing that the allegations could not have been raised previously. Land, Id. Appellant, just as he did when he filed his Petition for Writ of Habeas Corpus in the circuit court, is attempting to use a Petition for Writ of Mandamus to circumvent this clear procedural bar to another successive post-conviction relief application.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the decisions of the lower court be affirmed.

Respectfully submitted,

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January 30 2015.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
J. Derham Cole, Circuit Court Judge

Appellate Case No. 2014-000595

THE STATE OF SOUTH CAROLINA,.....RESPONDENT

v.

FRAZIER WILLIAMS,.....APPELLANT.

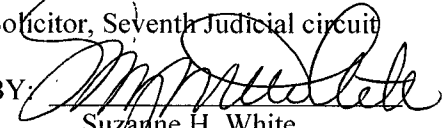
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211(b),
SCACR..

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JAN 30 2015

SC Court of Appeals

Columbia, South Carolina
January 30, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO CHEROKEE COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2014-000595

Frazier Williams,.....Petitioner,

v.


State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Final Brief of Respondent** has been served upon the applicant by mailing two (2) copies in the United States mail, postage prepaid, addressed to Petitioner's counsel:

**Frazier Williams, #227393
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Pelzer, SC 29669**

This 30th day of January, 2015.


SUZANNE H. WHITE
ATTORNEY FOR RESPONDENT

SWORN to before me this 30th day of January, 2015.

Notary Public for South Carolina.
My Commission Expires: _____

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JAN 30 2015

SC Court of Appeals