

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHESTER COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable W. Jeffrey Young, Circuit Court Judge

Appellate Case No. 2014-002072

Earl Malcolm Burr, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

1. Whether the PCR court erred in applying Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004), to deny PCR counsel's motion to continue the PCR hearing where the local detention center failed to provide Petitioner with his psychiatric medications during the five days preceding the hearing?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chester County Clerk of Court. Petitioner was indicted during the January 2012 term of the Chester County Grand Jury for hit and run involving death (2012-GS-12-005) and felony DUI causing death (2012-GS-12-006). Petitioner was represented by Mike Lifsey, Esquire. On May 8, 2012, Petitioner appeared before the Honorable Brooks P. Goldsmith, where he entered an Alford plea. Judge Goldsmith sentenced Petitioner to twenty (20) years imprisonment.

Petitioner filed a Notice of Appeal (Appellate Case No. 2012-212238). The South Carolina Court of Appeals dismissed the appeal for failure to provide sufficient explanation as required by Rule 203, SCACR. The Remitter was issued on October 15, 2012.

Petitioner filed an application for post-conviction relief (PCR) on May 21, 2013. (App.pp.63-69). A hearing was held at the Lancaster County Courthouse on July 28, 2014. Petitioner was present and represented by Nathan Sheldon, Esquire. J. Croom Hunter, Esquire of the South Carolina Attorney General's Office represented Respondent. (App.pp.75-104) The Honorable W. Jeffrey Young denied relief in an order filed September 12, 2014. (App.pp.105-112). This appeal follows.

SUMMARY OF THE FACTS

Petitioner showed up intoxicated at a local tattoo artist's home in Rock Hill. After an altercation, Petitioner took a canvas painting by the tattoo artist, and he absconded in a green Ford Explorer. Petitioner fled south from Rock Hill on I-77. Around mile marker 65, a motorist dialed the Highway Patrol to report Petitioner was driving erratically. The motorist described Petitioner and later identified him as the driver behind the wheel of the Ford Explorer. A convoy

of tractor-trailers attempted to block Petitioner's vehicle from proceeding further down the interstate. They were unsuccessful. At some point another motorist called the Highway Patrol to report Petitioner's speed and erratic driving. Before entering Fairfield County, Petitioner's vehicle struck the victim's vehicle, sending the victim's vehicle off the interstate and into the trees, killing the victim. Petitioner's vehicle spun into the median, at which point more motorists attempted to block his escape, but he was once again able to make his way south. A piece of shattered taillight, which matched to Petitioner's Ford Explorer, was found at the accident scene. Another motorist dialed 911 and gave Petitioner's license plate number to the dispatcher. That motorist followed Petitioner from mile marker 51 to mile marker 40 before Petitioner was able to speed away, and the motorist lost sight of him. A subsequent investigation revealed Petitioner sent incriminating text messages and made phone calls during his flight down the interstate. Petitioner left the interstate in Fairfield County at Exit 32, where he ran out of gas. His Explorer was discovered on the side of the road approximately four hours after the accident that killed the victim. The tattoo artist's canvas was recovered in Petitioner's vehicle, along with Petitioner's shoes. Petitioner was located a couple of miles away at a gas station. The gas station employees indicated Petitioner had been loitering at the station for approximately two hours by the time the police arrived. Petitioner was shoeless, penniless, and asking for a gas can. Witnesses also indicated Petitioner was on the phone, asking his girlfriend to pick him up because the police were looking for him. While at the station, Petitioner also asked a local to beat him up, so he would appear bruised. Upon being taken into custody, Petitioner was transported to Fairfield Medical Center, where his blood was drawn approximately five hours after the wreck. At that point his blood alcohol content was .089. (App.pp.9-15).

STANDARD OF REVIEW

This Court will uphold the findings of the PCR court if there is any evidence of probative value to support them but will reverse the PCR court's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000); Morris v. State, 371 S.C. 278, 282, 639 S.E.2d 53, 56 (2006). The granting or denial of a motion for a continuance is within the sound discretion of the trial judge whose ruling will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the appellant. State v. Dingle, 279 S.C. 278, 306 S.E.2d 223 (1983); State v. Babb, 299 S.C. 451, 454, 385 S.E.2d 827, 829 (1989).

ARGUMENT

Certiorari is unwarranted to review whether the PCR court erred in applying Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004), to deny PCR counsel's motion to continue the PCR hearing because the PCR judge did not abuse his discretion in ruling Petitioner was not required to be competent for his PCR hearing to proceed.

Petitioner asserts that the post-conviction relief judge erred in applying Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004), to deny PCR counsel's motion to continue the PCR hearing where the local detention center did not provide Petitioner with his psychiatric medications prior to the PCR hearing. This argument is without merit.¹

A PCR action is a civil action. See Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002) (citing 17 S.C. Jur. 2 (1993) ("State post-conviction relief is a civil action by which a person convicted of, or sentenced for, a crime, and who is either detained or faces a possibility of detention, institutes a proceeding to challenge a court's conviction or sentence on constitutional grounds.")). Therefore, the constitutional protections that forbid a criminal trial of a mentally incompetent defendant do not apply. Council, 359 S.C. at 125. The default rule is that PCR

¹ Petitioner asks this Court to remand for a new PCR hearing. Respondent submits that based upon the arguments herein, such a remand is unnecessary. However, should the Court order a new PCR hearing, Respondent submits Petitioner should be barred from raising any allegations that have not already been pled to the lower court.

hearings must proceed even though a petitioner is incompetent. For issues requiring the petitioner's competence to assist his PCR counsel, such as a fact-based challenge to his defense counsel's conduct at trial, the PCR judge may grant a continuance, staying the review of those issues until petitioner regains his competence. All other PCR claims will not be subject to a continuance based on a petitioner's incompetence. Id. at 130.

Petitioner's argument has two flaws: First, the language in Council states the PCR judge **may** grant a continuance when the petitioner raises fact-based challenges to counsel's conduct at trial. Supra (emphasis added). As such, the language in Council does not require the PCR judge to grant a continuance in such instances. Second, Petitioner's mental competency was not an issue at the PCR hearing. "If Respondent's incompetency inhibited the PCR challenge, then a continuance would have been proper." Council v. State, 380 S.C. 159, 181, 670 S.E.2d 356, 367 (2008). Thus, the permissive exception to the rule laid out in Council v. Catoe was not applicable, and it is not necessary to analyze whether the allegations constituted a fact-based challenge.

At the PCR hearing, PCR Counsel moved for a continuance, arguing his client was not ready to proceed because he had not been provided his medications at the county detention center in the days leading up to his PCR hearing. Respondent argued, "Your Honor, the state's ready to go forward. We would refer your Honor to Council v. Cato. The cite for that is 359 S.C. 120. That's a 2004 case which essentially states that Mr. Burr would not need to be competent to go forward on his P.C.R." The PCR judge ruled, "Well, I'm listening to him right now, and he seems lucid. He knows. He's answering your questions. I'm going to go ahead and proceed. The record is – I've got the transcript and everything like that. So we'll proceed." (App.p.79). In the PCR judge's order dismissing Petitioner's application, the judge wrote,

The State objected to Applicant's motion for a continuance. This Court denied Applicant's request pursuant to Council v. Catoe, 359 S.C. 120, 123, 597 S.E.2d 782, 783 (2004) (holding a petitioner's mental competency does not impede his ability to assert his meritorious PCR claims). Additionally, this court had a full opportunity to observe Applicant during the PCR hearing and finds no deficiencies in Applicant's mental competency.

(App.p.106).

While Petitioner's mental competency is clearly not required under the Court's ruling in Council v. Catoe, Respondent submits that the PCR judge correctly found Petitioner's testimony at the PCR hearing reflected he was fully aware of what was going on and did not inhibit the PCR proceeding. On direct examination by PCR Counsel, Petitioner had no trouble laying out his allegations and articulating the reasons he believed Counsel was ineffective, namely that Counsel did not spend enough time working on his case and that there was no evidence against him.²³ (App.pp.79-82). It was not until Respondent began to cross-examine Petitioner that his responses became evasive and he feigned trouble with his memory. (App.pp.83-88). The PCR judge, who had the opportunity to observe Petitioner's testimony and judge his credibility, found Petitioner's testimony not credible. (App.p.109). Consequently, the record reflects Petitioner knew exactly what he was doing when he chose how to answer questions posed to him on the witness stand. Respondent submits this Court should not indulge Petitioner's efforts to mislead it by claiming his memory was suffering when in reality he merely chose to affect ignorance when the questions (and resulting answers) did not suit him. Accordingly, Respondent submits the record clearly reflects the PCR judge did not abuse his discretion by ordering the proceeding to go forward. As such, Petitioner's claim is without merit.

² Respondent submits the record clearly reflects the evidence against Petitioner was overwhelming, despite his claims to the contrary.

³ Respondent submits that because Petitioner was able to fully enumerate all of his allegations at the initial PCR hearing, despite his alleged but unproven incompetence, a new hearing would be futile, as Petitioner has not shown how the judge's decision not to grant a continuance has resulted in any prejudice.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: 
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9 / 11, 2015

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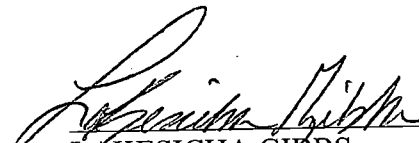
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Laura R. Baer, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 14th day of September, 2015



LAKESICHA GIBBS
LEGAL ASSISTANT