

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO DORCHESTER COUNTY
Court of Common Pleas
Maité Murphy, Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2014-002323

RODNEY ELLIOTT,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
SC Bar No. 100108
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

Did the post-conviction relief court err in dismissing Petitioner's third post-conviction relief action, where Petitioner failed to meet his burden of establishing after discovered evidence and failed to state a claim upon which relief could be granted?

STATEMENT OF THE CASE

The Dorchester County Grand Jury indicted Petitioner during the May 1997 term for criminal sexual conduct with a minor in the second degree (1997-GS-18-0238) and criminal sexual conduct with a minor in the first degree (1997-GS-18-0239). Gene Dukes, Esquire, represented him. On July 22, 1998, Petitioner proceeded to a jury trial before the Honorable Luke N. Brown. On July 24, 1998, the jury convicted Petitioner of criminal sexual conduct with a minor in the second degree, but acquitted him of criminal sexual conduct with a minor in the first degree. Judge Brown sentenced Petitioner to a term of twenty years confinement.

Petitioner filed a notice of appeal and an appeal was perfected on his behalf. Following an Anders¹ review, the South Carolina Court of Appeals dismissed the appeal. State v. Elliott, Op. No. 2000-UP-0684 (S.C. Ct. App. filed November 15, 2000). Subsequently, Petitioner submitted a Petition for Rehearing, which was denied on January 25, 2001. The Remittitur was issued on March 8, 2001.

Thereafter, Petitioner filed an initial application for post-conviction relief on July 25, 2001 (C.A. 2001-CP-18-0903). In his application, Petitioner alleged he was being held in custody unlawfully based on the following grounds:

1. "Lack of jurisdiction over subject matter and defendant;"
2. "Improper venue, Insufficiency of process and service;"
and
3. "Failure to state facts sufficient to constitute a cause of action."

¹ Anders v. California, 386 U.S. 738 (1967).

Respondent made its Return and Motion to Dismiss, requesting the application be summarily dismissed for failure to state a genuine issue of material fact which would necessitate an evidentiary hearing.

An evidentiary hearing on the merits of Petitioner's application was held October 14, 2002, at the Dorchester County Courthouse before the Honorable Diane S. Goodstein. By order signed April 25, 2003, Judge Goodstein denied and dismissed the application, finding that Petitioner had failed to carry his burden of proof showing ineffective assistance of trial counsel. Thereafter, Petitioner filed a motion to alter or amend the order pursuant to Rule 59(e), SCRPC, and a notice of appeal. This Court dismissed Petitioner's appeal without prejudice until the pending motion was ruled upon by order dated July 1, 2003; the Remittitur was sent on July 21, 2003. Judge Goodstein subsequently denied Petitioner's pending motion on April 27, 2005. Petitioner then filed another notice of appeal and South Carolina Court of Appeals denied certiorari on July 11, 2006. The Remittitur was sent on August 11, 2006.

Petitioner filed a second application for post-conviction relief on May 12, 2007 (C.A. 2007-CP-18-0736). In his second application, Petitioner alleged that he was being held in custody unlawfully based upon the following grounds:

1. "The [Petitioner] alleges that he was denied his Sixth Amendment right to the effective assistance of counsel where counsel failed to investigate and procure evidence that the [Petitioner] did not have any sexually transmitted diseases which would have shown that he was not the perpetrator of the sexual offenses committed;"
2. "The [Petitioner] alleges that he should be permitted to raise this allegation in the present application where the evidence is after-discovered and if presented during trial, would have likely resulted in a verdict of not guilty;" and

3. "The [Petitioner] alleges that he is entitled to raise this allegation in the present application based on an intervening decision by the United States Supreme Court which held that a criminal defendant is denied due process where forensic evidence discovered after trial would show that he is actually innocent of the crime which he is convicted."

Respondent made its Return and Motion to Dismiss on September 28, 2007, requesting the application be summarily dismissed as successive and as filed beyond the statute of limitations. Judge Goodstein, acting in her capacity as Chief Administrative Judge for the First Judicial Circuit, issued a Conditional Order of Dismissal, dated April 25, 2008, and filed May 16, 2008, provisionally denying and dismissing the application as successive and barred by the one-year statute of limitations, but giving Petitioner twenty days to respond as to why the Conditional Order should not become final. After receiving no response, Judge Goodstein issued a Final Order of Dismissal denying and dismissing the application with prejudice signed on October 1, 2008, and filed on October 14, 2008. No notice of appeal was filed.

Petitioner filed a third application for post-conviction relief on March 16, 2010 (C.A. 2010-CP-18-0747). In his third application, Petitioner held he was being held unlawfully based upon the following grounds:

1. After-discovered Evidence; and
2. Ineffective assistance of post-conviction relief counsel in his 2007 post-conviction relief case.

Respondent made its Return and Motion to Dismiss on April 12, 2011 and its Amended Return and Motion to Dismiss on April 23, 2013. In its Amended Return and Motion to Dismiss, Respondent requested the application be summarily dismissed as barred by the statute of limitations, successive to Applicant's two prior post-conviction relief actions,

barred by the doctrine of laches, and for failure to state a claim upon which relief could be granted. The Honorable Edgar W. Dickson, acting in his capacity as Chief Administrative Judge for the First Judicial Circuit, signed a Conditional Order of Dismissal on April 29, 2013, provisionally dismissing the application but giving Petitioner twenty days to respond. After receiving an objection from Petitioner, Judge Dickson requested a hearing be held on Respondent's Motion to Dismiss.

A hearing on Respondent's Motion to Dismiss was convened May 28, 2014, at the Dorchester County Courthouse before the Honorable Maité Murphy. Petitioner was present at the hearing and was represented by counsel, Mark L. Archer, Esquire. Respondent was represented by Assistant Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office.

After a review of all materials presented and arguments set forth at the hearing, the post-conviction relief court denied and dismissed Petitioner's application by written order signed August 18, 2014, and filed on August 27, 2014. Thereafter, Petitioner filed a motion to reconsider pursuant to Rule 59(e), SCRCP. Respondent filed a return to this motion on September 12, 2014. The post-conviction relief court denied and dismissed Petitioner's motion by written order signed September 29, 2014, and filed October 17, 2014.

Petitioner filed a Notice of Appeal on October 29, 2014. Thereafter, Petitioner filed a Petition for Writ of Certiorari on April 22, 2015. This Return follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief ruling is whether "*any* evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's findings. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court if it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, 466 U.S. 668. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

This Court has held that "when counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing trial counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)).

ARGUMENT

The post-conviction relief court properly dismissed Petitioner's third post-conviction relief action, where Petitioner failed to meet his burden of establishing after discovered evidence and failed to state a claim upon which relief could be granted.

Petitioner asserts that the post-conviction relief court erred in dismissing² his third application, arguing that he had meritorious grounds on which to proceed forward. Specifically, Petitioner argues that counsel from his second post-conviction relief action (C.A. 2007-CP-18-0736) was ineffective for failing to respond to the court's Conditional Order of Dismissal and for failing to file a notice of appeal from the Final Order of Dismissal. Additionally, he argues that his claim of newly discovered evidence had merit and should not have been dismissed.

In its Order of Dismissal, the post-conviction relief court held that Petitioner had failed to make the requisite showing of newly discovered evidence to entitle him to relief, noting that Petitioner had failed to satisfy any of the five factors as set forth in Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983). The court also found that Petitioner's allegation that counsel for this second post-conviction relief action was ineffective was not a ground upon which relief could be granted. The court noted that Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999), did not provide Petitioner with a ground for proceeding forward, as Odom provides that an applicant may maintain a subsequent action against post-conviction relief counsel only when post-conviction relief counsel failed to file an appeal from the denial of his *initial* application. These findings

² Petitioner repeatedly states that the post-conviction relief court summarily dismissed his application, intimating that he did not have a fair opportunity to argue the merits of his claims before the court dismissed his application. However, this is inaccurate representation of the record, as Petitioner, alongside appointed counsel, fully presented argument to the court as to why his matter should not be dismissed.

are not based upon an error of law and are supported by ample evidence in the record. This Court should deny this petition.

Petitioner cites McCoy v. State in support of his position. McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013). However, Petitioner's case is readily distinguishable from McCoy. In McCoy, petitioner filed a successive application after reviewing the trial transcript of a fellow inmate whose trial occurred the day after the petitioner's and discovering that a jury who was seated for his trial had failed to advise the court that she was related to an employee of the Seventh Circuit Solicitor's office despite later advising the court in his fellow inmate's case that her cousin was married to the Seventh Circuit Solicitor. Id. at 367, 737 S.E.2d at 625. After this discovery, the petitioner filed his second post-conviction relief application, alleging that he was denied his Sixth Amendment right to a trial by an impartial and objective jury and that if he had known of the juror's relationship to the Seventh Circuit Solicitor, he would have used his preemptory challenges differently. Id. The petitioner further argued he was unable to raise this allegation in his previous application as he was unaware of the juror's relationship to the Solicitor until he reviewed the fellow inmate's case file four years later. Id. The post-conviction relief court summarily dismissed his application without a hearing. Id. The McCoy Court reversed the post-conviction relief court and remanded the matter for an evidentiary hearing, holding there was a genuine issue of material fact as to whether the petitioner's allegation of juror misconduct was successive or untimely and, therefore, the post-conviction relief court erred in summarily dismissing the petitioner's application. Id. at 370, 737 S.E.2d at 627. The McCoy Court reasoned that the petitioner was entitled to the benefit of the discovery rule and could raise this allegation because

there was no evidence in the record to refute that he was not entitled to that benefit. *Id.* at 370, 737 S.E.2d at 627. The McCoy Court further noted that “in the context of PCR allegations *involving juror misconduct*, the standard five-pronged newly discovered evidence test . . . has no application and should not be used as a basis for summary dismissal.” *Id.* at 372, 737 S.E.2d at 628 (emphasis added). Additionally, citing to S.C. Code Ann. § 17-27-45(C), the McCoy Court noted that “if a PCR applicant discovers ‘material facts *not previously presented and heard* that require [] vacation of [his] conviction or sentence,’ he may file a [successive] PCR application.” *Id.* at 368-69, 737 S.E.2d at 626 (emphasis added).

However, Petitioner’s case is readily distinguishable. First, the alleged newly-discovered evidence in Petitioner’s case does not involve any alleged juror misconduct, but rather, involves alleged results of testing for sexually transmitted diseases and/or DNA testing. Second, Petitioner’s claim of newly-discovered evidence on this very ground was already been presented to and heard by: the initial post-conviction relief court, the reviewing court during the appeal of his first post-conviction relief action, and the second post-conviction relief court. See Am. App. pp. 373, 375, 381, 383, 452-57. The primary issue in those actions was whether trial counsel was ineffective for failing to obtain and submit evidence that Petitioner was not afflicted with a venereal disease—the very claim that Petitioner is now alleging to be newly-discovered in this third post-conviction relief action. Am. App. pp. 373, 381, 454-55. The initial post-conviction relief court denied and dismissed this allegation with prejudice after a full evidentiary hearing, and the reviewing appellate court declined to grant certiorari. Am. App. pp. 388, 455-57. This is the *exact* allegation Petitioner alleges in his current application. See App. pp. 293,

301, 332. Therefore, S.C. Code Ann. § 17-27-45(C) is wholly irrelevant to Petitioner's case and McCoy is inapplicable, as this issue has been presented and ruled upon by both the circuit and appellate courts.

Petitioner also cites to Odom v. State in support of his position. Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999). In Odom, this Court reversed the post-conviction relief court's dismissal of his application and remanded his case for an evidentiary hearing, finding that the petitioner did not receive a "complete 'bite at the apple' because both of his PCR applications were summarily dismissed before he was appointed legal counsel." Id. at 262, 523 S.E.2d at 756. This Court further remanded the petitioner's case for an evidentiary hearing to determine whether or not the petitioner knowingly and intelligently waived his right to appellate counsel following the dismissal of his initial post-conviction relief application. Id. at 263, 523 S.E.2d at 756. However, Odom is inapplicable to Petitioner's case, as Petitioner asserts he was denied ineffective assistance of counsel in a *second and subsequent* post-conviction relief action. Petitioner's case is further distinguishable, as Petitioner was appointed legal counsel in his initial application in 2001 as well as legal counsel in his appeal from the denial of that application. See Am. App. pp. 377-78, 452.

Furthermore, Petitioner's allegation that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground upon which post-conviction relief can be granted. In Martinez, the United States Supreme Court held that inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a claim of ineffective assistance of counsel in a federal habeas action. Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012). The Martinez Court noted, however, that:

The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. It *does not* extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.

Id. (emphasis added). This Court has previously rejected an application's claims that he is entitled to relief against prior post-conviction relief counsel in a subsequent state application, finding Martinez is not applicable to state post-conviction relief actions.

See Kelly v. State, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013) (finding the holding in Martinez is limited to federal habeas corpus review and is not applicable to state [PCR] actions). Therefore, Petitioner is unable to raise his claim of ineffective assistance of prior post-conviction relief counsel in his current application, as a third and successive application for post-conviction relief is not the appropriate channel through which Petitioner can raise this claim.

Furthermore, there is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior post-conviction relief counsel was ineffective is not *per se* a "sufficient reason" warranting a successive post-conviction relief application under 17-27-90." Aice, 305 S.C. at 451, 409 S.E.2d at 394. This Court has held that an applicant may successfully raise a claim of ineffective assistance of collateral counsel in only the narrowest of situations, such as when post-

conviction relief counsel from an initial application fails to file an appeal on the applicant's behalf. See Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) (recognizing that the constitutional right to counsel does not extend to discretionary appeals on collateral attack, but allowing a PCR applicant to receive a belated appeal from the denial of his initial PCR application where first PCR counsel failed to file a notice of appeal). In the present case, Petitioner was afforded appellate review of his initial post-conviction relief action and therefore is not entitled to relief under Austin.

Additionally, this Court has held that "if the Attorney General asserts that the application is barred as being successive or as being untimely under the statute of limitations, counsel *will not* be appointed except upon written order of the Chief Judge for Administrative Purposes for the Court of Common Pleas in the circuit." Appointment of Counsel in Post-Conviction Relief Cases before the Circuit Court, 2008-10-06-01 (S.C. Sup. Ct. dated Oct. 6, 2008) (citation omitted) (emphasis added). Here, Applicant was afforded counsel at both the circuit and appellate level of his initial post-conviction relief application and was therefore not entitled to the appointment of counsel in his second and successive post-conviction relief application in 2007.

Based on the foregoing, the post-conviction relief court did not err in dismissing Petitioner's third application for post-conviction relief, as he failed to state a claim upon which relief could be granted and failed to establish any newly discovered evidence. This Court should deny this petition.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
SC Bar No. 100108
Assistant Attorney General

By: Megan Harrigan Jameson
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

Sept. 14, 2015

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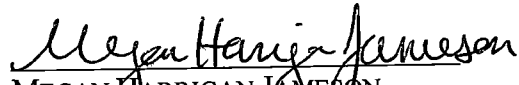
PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 14th day of September, 2015.


MEGAN HARRIGAN JAMESON
ASSISTANT ATTORNEY GENERAL

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737