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THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM HORRY COUNTY

Court of Common Pleas

S.C. SUPREME COURT

The Honorable William H. Seals, Jr., Circuit Court Judge

Case No.: 2014-CP-26-2301

Terrence L. CoxAppellant

S.C.D.C #232219

V.

The State Respondent

EXPLANATION

**Terrence L. Cox #232219
Lieber Corr. Inst.
P.O. BOX 205
Ridgeville, SC 29472**

APPELLANT, PRO SE

STATEMENT OF FACTS

Applicant, Terrence L. Cox, was indicted during the August 2003 term of the Horry County Grand Jury for Armed Robbery (2003-GS-26-2240), three (3) counts of Assault and Battery with Intent to Kill (ABWIK) (2003-GS-26-2240, 2241, 2242), and Murder (2003-GS-26-3170). He was later indicted in August 2005 for another count of ABWIK (2005-GS-26-3170). Applicant proceeded to trial, and a jury found him guilty as indicted. Orrie E. West, Esquire, represented Applicant. On September 21, 2005, the Honorable Paula H. Thomas sentenced Applicant to concurrent terms of imprisonment of twenty (20) years for each ABWIK, thirty (30) years for Murder, and thirty (30) years for Armed Robbery.

Applicant appealed, and the South Carolina Court of Appeals affirmed his convictions. State v. Cox, Op No. 2008-UP-528 (S.Ct. App. filed Sept. 11, 2008). The remittitur was issued on September 29, 2008.

Applicant filed his first PCR application on October 7, 2008, alleging the following grounds for relief:

1. Failure to object to fatal variances in the indictment, in that the indictments charged him as a principal, yet at trial the hand of one is the hand of all theory was used by the State.
2. Counsel abandon the Applicant at a critical stage of trial when she conceded material facts and agreed the hand of one is the hand of all doctrine applied in her closing argument;

3. Failure to object when the prosecutor vouched for testimony of a key witness and the co-defendants;
4. Failure to call a key witness at trial; and
5. The trial court abused its discretion in failing to grant counsel's motion for directed verdict and by giving erroneous jury charge on the "hand of one is the hand of all" theory.

Respondent made its return on December 5, 2008, and an evidentiary hearing was held on April 27, 2009. Paul Archer, Esquire, represented Applicant. The Honorable Steven H. John denied and dismissed the application on May 28, 2009.

Applicant appealed, and the South Carolina Supreme Court denied his Johnson petition for writ of certiorari on April 21, 2011. The remittitur was issued on May 12, 2011.

Applicant filed a pro se federal petition for a writ of habeas corpus on June 22, 2011. The Respondent made its return motion for summary judgment on November 18, 2011. The Honorable Kevin F. McDonald, United States Magistrate Judge, issued a report on July 16, 2012, recommending that Respondent's motion for summary judgment be granted. The Honorable Cameron McGowan Currie, United States District Judge, granted Respondent's motion for summary judgment and dismissed the petition with prejudice on August 16, 2012.

Applicant filed his second and current PCR application on April 14, 2014, alleging the following grounds for relief:

1. 6th Amendment violation:
 - i. Ineffective assistance of counsel.
2. 14th Amendment violation:
 - i. Due process violation.

Respondent made a timely Return and Motion to Dismiss on or about May 19, 2015, requesting the Application be summarily dismissed as successive and untimely. Pursuant to this motion, the Honorable Steven H. John reviewed the pleadings in this matter and all of the records attached thereto. Judge John issued a Conditional Order of Dismissal, filed on June 1, 2015, provisionally ~~denying and dismissing this~~ action, while giving Applicant twenty (20) days from the date of service of said order to show why the dismissal should not become final.

Applicant filed an Amended Application on June 25, 2015. In that filing, he alleges "lack of jurisdiction" as a ground for relief. Applicant filed a Response to the Conditional Order on July 15, 2015. In that filing, Applicant alleges he was mentally incompetent at his prior post-conviction relief hearing. On August 20, 2015, Judge John issued a Final Order of Dismissal summarily dismissing Applicant's application. He found that the issues raised in Applicant's initial application all involved legal issues and did not require Applicant's competent to proceed. Further, he found that Applicant did not presented any

evidence of his mental incompetence. Finally, he found that Applicant's claim of lack of subject matter jurisdiction is meritless. Applicant filed a timely Notice of Appeal and this appeal follows.

ARGUMENT

The PCR Court Erred in Dismissing Petitioner's PCR Application without an Evidentiary Hearing

In Mc Coy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013),
this Court held:

"Where an applicant alleges facts that would
establish an exception to either the statute
of limitation or the prohibition against
successive PCR applications and those facts are not
conclusively refuted by the record before the
PCR court, a question of fact is raised which
can only be resolved by a hearing"

In the PCR court's conditional order of dismissal, the PCR judge informed Petitioner of his intent to dismiss the application without a hearing for being successive and untimely. The PCR judge advised Petitioner that he had twenty (20) days to respond and state a sufficient reason why the application should not be dismissed as successive and time-barred.

In Petitioner's Response in Opposition to the Conditional Order of Dismissal, he argued that due to his mental incompetency at his first PCR hearing, he was prevented from assisting his counsel on a fact-based claim of ineffective assistance of counsel and now that he has regain his competency, he is entitled

to an evidentiary hearing on his claim of ineffective assistance of counsel in accordance with Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004) ("post-conviction relief petitioner cannot delay his collateral review of his trial proceedings due to his incompetency; however, if, at a future date, the petitioner regains his competency and discovers that at his original post-conviction relief hearing, his incompetency prevented his ability to assist his counsel on a fact-based claim of ineffective assistance of counsel, he may then raise that claim in a subsequent proceeding"). Furthermore, Petitioner argued that he filed the application within one (1) year after he regain his competency.

In support of his response, Petitioner submitted an affidavit stating that during the course of his first PCR hearing, he was on psychiatric medication which impeded his ability to assist his lawyer on his claims of ineffective assistance of counsel. He further stated that he regain his competency January, 2014, and discovered that there several claims of ineffective assistance of counsel that were not raised or inadequately raised at his original PCR hearing.

As stated in McCoy, once an applicant alleges facts that would establish an exception to the statute of limitation or the successive rule and those facts are not conclusively refuted by the record before the PCR court, then a question of fact is raised that can only be resolved by a hearing. Petitioner alleged that his mental incompetency prevented him from assisting his

lawyer on a fact-based claim of ineffective assistance of counsel (which is an exception to the statute of limitation and successive rule) and those facts were not conclusively refuted by the record before the PCR court. In fact, the PCR court did not have anything in the record to refute Petitioner's claim of mental incompetency.

In its Final Order of Dismissal, the PCR court found that the issues raised in Petitioner's initial application all involved legal issues and were not so fact intensive as to require Petitioner's competence to proceed. Petitioner submits that his allegations of ineffective assistance of counsel raises questions that are outside the record; therefore, it did in fact, require Petitioner's competence to proceed. Once again, this Court ruled in Catoe that a petitioner may raise a claim of ineffective assistance of counsel in a second PCR hearing if, his mental incompetency prevented him from raising that issue or assisting his lawyer on that issue in his first PCR hearing. That is exactly what happened in this case. Therefore, this Court should grant Petitioner a second PCR hearing to determine whether he's entitled to relief on his claim of ineffective assistance of counsel.

Furthermore, the PCR court found that Petitioner did not presented any evidence of his mental incompetence. Petitioner submits that his affidavit is evidence of his mental imcompetence. McCoy (*when considering the state's motion for summary dismissal, where no evidentiary hearing has been held,

the PCR judge must assume facts presented by applicant are true and view those facts in the light most favorable to the applicant."); Rule 56 (e), S.C.R.Civ.P.

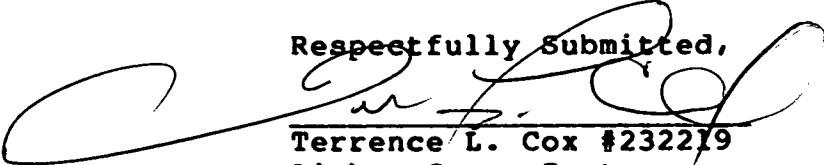
Finally, the PCR court found that Petitioner's allegation the trial court lacked subject matter jurisdiction is meritless. Petitioner submits that the PCR court misconstrued his allegation. Petitioner did not argued that the trial court lacked subject matter jurisdiction. He argued that the trial court did not have jurisdiction under Article 3, section 1 of the United States Constitution which provides : The judicial Power of the United States, shall be vested in one supreme court, and such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior . . .

Petitioner submits that the United States had original ~~jurisdiction~~ jurisdiction over his case not Horry County Court of General Sessions.

CONCLUSION

Based upon the foregoing reasons, Petitioner believes that he's provided a sufficient explanation as to why the PCR court determination was improper.

Respectfully Submitted,



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