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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2014-001470

Alfonso Ware, Jr.

Appellant,

v.

The State,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Other Counsel of Record:
Office of the Attorney General
Alan Wilson, Attorney General
c/o Donald J. Zelenka, Esq.
Post Office Box 11549
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Alfonso Ware Jr.

Alfonso Ware Jr.
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CERTIFICATE OF COUNSEL

Certificate of Counsel

Appellant certifies that the South Carolina Court of Appeals issued an Order denying appellant Motion to dismiss without prejudice on October 16, 2015 and received by the Appellant on October 29, 2015.

QUESTION PRESENTED

Did the South Carolina Court of Appeals err when the Court denied Appellant's motion to dismiss without prejudice?

STATEMENT OF THE CASE

An Application for DNA testing was filed in the Lexington County Clerk of Court on July 26, 2013. On October 22, 2013, the Solicitor's Office of Lexington County filed a response and Motion for Summary Dismissal. On May 21, 2014, Appellant received from the Honorable William P. Keesley, Order of Intention to Summarily Dismiss the application for DNA testing. On May 13, 2014, filed Reply to Judge Keesley Order of Intention to Dismiss.

On June 18, 2014, the Court filed an Order of Summary Dismissal of Application for DNA Testing. A timely notice of appeal was filed. On July 29, 2014, Appellant filed his Initial Brief with the South Carolina Court of Appeals and the State responded.

On December 9, 2014, Appellant filed with the State Law Enforcement Division, Freedom of Information Request No. 2014-942. On February 4, 2015, the Appellant received from SLED a response to the F.O.I.A. request. On June 2, 2015, Appellant filed with the S.C. Court of Appeals Motion for Relief from Judgment.

On July 28, 2015, Appellant filed with S.C. Court of Appeals Motion to Dismiss Appeal Without Prejudice. On August 14, 2015, the State filed its Return to Appellant Motion to Dismiss Without Prejudice. On October 16, 2015, the S.C. Court of Appeals issued an Order denying Appellant Motion to Dismiss without Prejudice. This Petition for Writ of Certiorari follows.

ARGUMENT

DID THE SOUTH CAROLINA COURT OF APPEALS ERR WHEN THE COURT DENIED APPELLANT'S MOTION TO DISMISS WITHOUT PREJUDICE?

This matter comes before this Court by a denial by the S.C. Court of Appeals (on October 19, 2015, and received by the Appellant on October 29, 2015) of Appellant's motion to dismiss without prejudice and with leave to appeal again dated July 28, 2015.

The Appellant request the Court of Appeals to dismiss the matter without prejudice, based upon the receipt of evidence from the State Law Enforcement Division that was not consider by Judge Keesley in his decision prior to denying Appellant's Application for DNA Testing.

In his May 13, 2014, Order conditionally denying the application, Judge Keesley concluded upon the October 22, 2013 response from the 11th Circuit Solicitor's Office that: After the Application was sent to the Solicitor's Office the following things were determined:

- a) The weapon and the clothing are not available for testing;
- b) the evidence from the trial was released by the Clerk of Court, pursuant to an Order of this Court dated August 24, 1998;
- c) On August 22, 2013, the Solicitor's Office of the 11th Judicial Circuit assigned investigators to review records

- and search for evidence and found no paperwork or evidence from the trial;
- d) The Solicitor's Office of the 11th Judicial Circuit instructed its Record Custodian to search for files related to this case and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the solicitor's staff;
 - e) The West Columbia Police Department does not have any evidence from the trial, as confirmed by the Evidence Custodian of that agency on August 26, 2013;
 - f) SLED does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Department on January 23, 1990, which was prior to the trial;
 - g) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and
 - h) the Lexington County Sheriff's Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

The Court in its Order of the Intention to Summarily Dismiss

footnote 1: the Court acknowledges that question could exist in the abstract about whether the absence of blood on the gun and on Mr. Ware, could go to an issue related to whether there is doubt as to murder versus accident or involuntary manslaughter.

The Criteria of the Evidence Preservation Act S.C. Code Ann. 17-28-10 through 320 has not been followed. The procedure to be followed in addressing a request under the Evidence Preservation Act have not been followed by any of the Custodians of the Evidence involved in this case and this is evident.

On December 9, 2014, Appellant filed with the State Law Enforcement Division, Freedom of Information Request No. 2014-942. As a result of the request the attached documents were provided by SLED:

1. Official Report of SLED Laboratory File No. L89-11725, December 4, 1989.
2. SLED Disposition of Evidence Form dated January 23, 1990 3:10pm

The fact that this evidence was available to the Appellant through his request to SLED proves that the Custodian of the Evidence and the Office of the Solicitor in their response to the Application for DNA Testing were not as thorough as they should have been in their search for evidence related to this case.

According to the documents provided by SLED, there was testing done by SLED, the results of which was not made available to the Appellant. The question is what are the results of the testing?

South Carolina Code Ann. §17-28-70(c) state: in part "provide the Appellant and the Solicitor with a copy of any document, note,

log, report relating to the physical evidence" the Custodian of the Evidence has failed to follow the requirement of the statute. The Respondent nor the Custodian's of the Evidence through their own pleading prove that the S.C. Code Ann. §17-28-10 through 320 has not been followed.

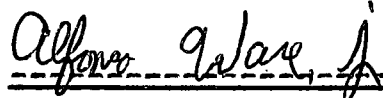
The Appellant through motion to dismiss without prejudice and leave to appeal again moved the Honorable South Carolina Court of Appeals to dismiss Appellant's appeal without prejudice to allow Appellant an opportunity to file a motion with Judge Keesley, informing him of the discovery of the SLBD documents. And giving Judge Keesley a chance to consider this evidence in conjunction with the fact the record before the Court proves that the criteria of the statute (17-28-10 thru 320) was not followed, and the investigation was not thorough. By any standard the Appellant was not given a fair opportunity under the criteria of the Preservation of Evidence Act.

The South Carolina Court of Appeals erred when they denied Appellant's motion to dismiss without prejudice, in light of the facts presented by the Appellant that support the need for further investigation. As well as documented fact that the Custodian of the Evidence and the Respondent did not do a thorough investigation or follow mandatory criteria set-out in the statute (§17-28-10 thru 320). The Court should have in the interest of justice and fairness have allowed the Appellant the opportunity to motion Judge Keesley with the evidence from SLBD.

CONCLUSION

There is one thing that is clear and not denied by the Respondent. The statute concerning the Preservation of the Evidence Act was not followed. The Appellant as a result is being denied his fair opportunity in this matter; despite the facts and the evidence presented by the Appellant the South Carolina Court of Appeals has reached a decision to deny Appellant's motion. This is a clear err and this Court must exercise its power and correct what the record before this Court demonstrates is an err by the Court of Appeals. For the reasons stated, Appellant asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,



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November 24, 2015

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November 24, 2015

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RE: Alfonso Ware Jr., v. The State
Appellate Case No. 2014-001470

Dear Ms. Kitchings:

Enclosed you will find the original Petition for Writ of Certiorari and Appendix with the six copies of the petition with two copies of the appendix. And also enclosed is a copy for my records to be clock-stamped and returned in the S.A.S.E.

All parties have been served with their copies of the appendix and petition with the certificate of service attached.

I appreciate your assistance in this matter greatly. Thank you very much, and have a blessed thanksgiving.

Sincerely,


Alfonso Ware Jr.

cc: Alan Wilson, Esquire
Donald J. Zelenka, Esquire
Donald V. Myers, Esquire
File

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