STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge

RONALD HARRIS PETITIONER,

V.

STATE OF SOUTH CAROLINA, RESPONDENT

APPELLATE CASE # 2015-001451

JOHNSON PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in denying Petitioner Harris a PCR review on the grounds that his application was not filed timely when Petitioner Harris had applied for new DNA testing pursuant to S.C. Code Section 17-28-10 for a more specific identification of the minor's DNA but learned at the November 2013 court hearing that the state had destroyed the evidence in his case which allowed him to pursue another PCR application under S.C. Code Section 17-27-45(C) and Section 17-28-90 (B)(6) which Petitioner filed July 8, 2014?

STATEMENT

In October 2001, the Greenville County Grand Jury indicted Petitioner Ronnie Harris for criminal sexual conduct (CSC) with a minor first degree, and indicted him in April 2003 for committing a lewd act on a child. On July 15-16, 2003, Harris proceeded to trial before the Honorable C. Victor Pyle, Jr. and a jury. Harris was represented by Daniel J. Farnsworth, and the state was represented by Bryna S. Seay. App. 1. The jury returned a verdict of guilty on both charges as indicted. App. 216, ll. 1 – 10. Petitioner Harris filed a notice of appeal which was perfected with the filing of an Anders[1] brief. Petitioner Harris then filed an affidavit requesting to "drop his appeal." The Court of Appeals dismissed his appeal with an order on April 15, 2004.

On July 2, 2004, Harris filed an application for post-conviction relief (PCR). The state filed a return on September 27, 2004. An evidentiary hearing was held on February 16, 2005 before the Honorable John C. Few. Harris was represented by Caroline Horlbeck, and the state was represented by Karen C. Ratigan. App. 233. On August 15, 2006, Judge Few issued an order denying Harris' PCR application, and dismissing it with prejudice. App. 247 – App. 252. Harris filed a Motion for a 59(E) Ruling which Judge Few denied on August 28, 2006. App. 256.

Harris filed an appeal which was perfected with the filing of a Petition for a Writ of Certiorari. The basis of the appeal was that trial counsel failed to object to hearsay. App. 259. In her petition for a writ of certiorari, appellate counsel wrote that the DNA evidence was "not so strong." App. 263. The South Carolina Supreme Court granted the petition. After the filing of briefs, the Supreme Court dismissed the writ of certiorari as improperly granted. App. 326.

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

Harris then filed a petition for a writ of habeas corpus in federal court, and the respondent filed a motion for summary judgment on July 6, 2009. The Honorable Joseph R. McCorey, the United States Magistrate judge issued a recommendation to grant the summary judgment motion. The Honorable Henry F. Floyd, United States District Judge, issued an order granting the summary judgment motion on October 21, 2009. App. 327. Harris appealed to the Fourth Circuit. However, the Fourth Circuit dismissed the appeal as they denied a certificate of appealability. App. 327.

On October 5, 2010, Petitioner Harris filed a second PCR application. The state filed a return on February 16, 2011. On February 22, 2011, The Honorable Robin B. Stilwell issued a Conditional Order of Dismissal stating his intent to dismiss the PCR application but granting Harris twenty days to show why the order should not become final.[2] App. 295 – App. 300. Harris asked for a continuance to respond but did not file a response. App. 303. On April 20, 2011, Judge Stilwell issued a Final Order of Dismissal denying Harris' PCR application and dismissing it with prejudice. App. 302 – App. 303. Harris filed a notice of appeal. The South Carolina Supreme Court dismissed the appeal on July 5, 2011 on the grounds that Harris failed to show in his explanation required by Rule 243 (c), SCACR, that there was an "arguable basis for asserting that the determination by the lower court was improper." App. 304.

On July 8, 2014, Petitioner Harris filed a third PCR application. App. 305. The state filed a return on December 5, 2014 requesting that the application be summarily dismissed because it was successive. App. 317- App. 323. On December 16, 2014, The Honorable Letitia H. Verdin issued a Conditional Order of Dismissal but granting Petitioner Harris twenty days to show why this order should not become final. [3] App. 325 – App. 331. Harris filed a response to the Conditional Order on

[2] An evidentiary hearing was not held.
[3] This order was issued without an evidentiary hearing.

January 26, 2015. App. 332 – App. 341. On April 13, 2015, Judge Robin Stilwell issued a Final Order of Dismissal denying Harris' PCR application and dismissing it with prejudice. App. 347 – App. 349. Petitioner Harris filed a Motion to Alter or Amend Judgment Pursuant to SCRCP 59(e). App. 351. The state filed a return on May 18, 2015. App. 355. Judge Stilwell issued an order on May 26, 2015 denying Harris' Motion to Alter or Amend. App. 364. Harris filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in denying Petitioner Harris a PCR review on the grounds that his application was not filed timely when Petitioner Harris had applied for new DNA testing pursuant to S.C. Code Section 17-28-10 for a more specific identification of the minor's DNA but learned in a November 2013 court hearing that the state had destroyed the evidence in his case which allowed him to pursue another PCR application under S.C. Code Section 17-27-45(C) and Section 17-28-90 (B)(6) which Petitioner filed July 8, 2014.

Ronnie Harris was charged with committing a sexual battery and lewd act on his nine year old biological daughter on April 23, 2001. App. 32, ll. 2 – App. 33, ll. 25. At the time of trial, the girl was eleven years old. App. 38, ll. 1 – App. 40, ll. 25. She testified that at the time, she lived with her mother but went to the house where her father lived with a friend every day after school. Sometimes her mother left her there alone for a while, and sometimes her mother stayed. App. 45, ll. 1 – App. 46, ll. 17.

One time, she spent the night with her father while her mother worked. She slept in the bed with her father as he had only a bedroom at a friend's house. The bed was a mattress on the floor where she slept. App. 46, ll. 18 – App. 49, ll. 25. Her father and his friends were drinking beer when she left and went to the bedroom and went to sleep. Later, her father came in and got in the bed with her. She woke up and her father allegedly "put his thing in her private part, and it hurt." Then he "sucked on her breasts until it hurt." She was afraid. App. 51, ll. 1 – App. 54, ll. 25.

Her mother picked her up the next morning. When her mother saw the girl's breasts with bruises on them, the girl told her what allegedly happened. Her mother took her to the hospital where she was examined. App. 55, ll. 1 – App. 58, ll. 14.

Dr. John Wilson was the pediatric emergency doctor who examined the girl. He knew there was an allegation of sexual intercourse and the sucking of the breast. Dr. Wilson was "unsure" as to the sexual intercourse. App. 87, ll. 3 – App. 88, ll. 22. His examination showed bruises on the girl's breasts consistent with sucking. He did not do a pelvic exam but did perform an external vaginal exam. She had a milky discharge from the vagina which was the only abnormal finding. There were no tears to the hymen, and no evidence of penetration. App. 89, ll. 5 – App. 93, ll. 24.

Grayson Amick was the forensic DNA analyst with SLED. App. 113, ll. 1 – 20. He performed the DNA analysis on the evidence from the hospital collected on the girl, and a blood sample from the girl. He had DNA samples from Harris as well. He also had three cuttings from a sheet and two cuttings from a pillow case which he analyzed. App. 116, ll. 6 – App. 117, ll. 25.

One of the cuttings from the sheet, Item 3.2, was semen which matched Harris' DNA. The second cutting from the sheet, Item 3.2, was a mixture that consisted of DNA from Harris and from the girl. The mixture was "most likely bodily fluids." Amick admitted that the girl's DNA could be skin cells but the level of DNA was "more consistent with probably some kind of bodily fluid." App. 118, ll. 1 – App. 122, ll. 6. Amick found no semen on the girl's rape kit. App. 118, ll. 13 – 18.

Petitioner Harris testified at trial that he and the girl's mother, Adrian, had been in a relationship since the girl was born. When he moved to the friend's house where he had one bedroom where the alleged incident occurred, the girl and her mother spent almost every night with him for two months before this incident. App. 147, ll. 3 – App. 150, ll. 25.

The Friday before this incident allegedly occurred, he and the girl's mother got into an argument, and he told Adrian to "go back home with her grandmother." Then Harris had another woman come over for that night, Friday. On Sunday, the girl's mother called and asked him to keep

the girl that night while she worked. That was the night of the alleged incident. App. 152, ll. 1 – App. 158, ll. 25. He was shocked when the girl's mother called him and told him of the girl's allegations. Harris denied doing these things to his daughter. He said that he and the girl's mother had sex in that same bed. App. 160, ll. 1 – App. 161, ll. 25.

The jury found Harris guilty of both charges. App. 216, ll. 1 – 13.

In his first PCR, Harris alleged ineffective assistance of counsel for failure to object to hearsay testimony. This PCR was denied on the basis that there was no prejudice to Petitioner Harris. App. 326. In his second PCR, Harris claimed newly discovered evidence, and that compelling him to give fluid samples was a constitutional violation. He also claimed trial counsel was ineffective for failing to establish a complete chain of custody for the blood and DNA evidence. This PCR application was denied. No evidentiary hearing was held. App. 327 – App. 328.

In his current 2014 PCR application, Harris claimed the DNA test results regarding the DNA mixture found on two cuts of bedsheets were inaccurate and inconclusive. This was true because the alleged body fluid of the victim was not identified as to what it was in accordance with SLED policies and procedures. He claimed that "any mixture would have been of him and the girl's mother or another person." He asked that his convictions and sentences be vacated or in the alternative, for a new trial. App. 312 – App. 313.

Judge Letitia H. Verdin issued a conditional order of dismissal without holding an evidentiary hearing. In her order, Judge Verdin held that Harris' PCR application should be summarily dismissed because he failed to comply with the filing procedures of South Carolina Code Section 17-27-10 which required that an application be filed within one year after the entry of judgment or the filing of the final decision upon an appeal. She wrote that he was convicted on July 13, 2003. The Supreme Court dismissed his appeal on April 15, 2004 at his request. Therefore,

Harris had to file his PCR application before April 15, 2005 but did not file this one until July 8, 2014. This was nine years after the statutory filing period ended. App. 328.

Judge Verdin also ruled that his application should be dismissed because it was successive to his previous PCR applications, and successive PCR applications were "disfavored." She cited Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 393, 394 (1991) which held that if these allegations could have been raised in a previous application, then the applicant cannot raise those grounds in successive applications. App. 329. She granted Harris twenty days to respond to the conditional order as to why it should not become final. App. 330.

In his response to Judge Verdin's order which Harris filed January 26, 2015, he explained that he had learned that SLED lab data and forensic analyses should be "specific and definitive in identifying all elements found and their source when it could be determined." He also became aware, in 2012, of the 2008 Access to Justice Post-conviction DNA Testing Act. He filed an application seeking more DNA testing. According to Harris, he was granted a hearing which was held on November 18, 2013.[4] At that time, Harris learned that the physical evidence and biological evidence for his case was destroyed on March 30, 2005 by Investigator James Austin, the lead investigator in Harris' case. This evidence was destroyed before the order from his first PCR was issued on August12, 2006. App. 252; App. 332 – App. 334. Harris claimed this was a violation of his due process rights under the Fifth and Fourteenth Amendments. Therefore, he claimed this was not a successive application. App. 334- App. 335.

[4] Christopher Scalzo, Esquire, confirmed that he represented Petitioner Harris at the November 18, 2013 hearing with Judge Letitia Verdin presiding. He confirmed that the state destroyed the evidence from Harris' trial in 2006 according to his case file.

Harris claimed that the previous PCR applications, his writ of habeas corpus, and the November 18, 2013 hearing tolled the statute of limitations. The decision of the hearing on November 18, 2013 was the final decision upon an appeal, and was new evidence. Therefore, his 2014 PCR application was filed timely. App. 337. Harris requested an evidentiary hearing for his 2014 PCR application based on his due process rights. App. 341.

Judge Robin B. Stilwell issued the Final Order of Dismissal on April 13, 2015 denying Harris' PCR application and dismissing it with prejudice. Judge Stilwell ruled that Harris did not present a sufficient reason to show why the conditional order of dismissal should not become final. Harris' numerous "collateral attacks of his conviction" did not toll the one year statute of limitations. The allegation of newly discovered evidence was without merit because he did not prove any of the five elements required for newly discovered evidence as provided in Hayden v. State, 278 S.C. 610, 611-612, 299 S.E.2d 854, 855 (1983).

South Carolina Code Section 17-27-45 provides that an application for post-conviction relief must be filed within one year after the entry of conviction or the filing of the final decision upon an appeal. Section 17-27-45 (C) provides that if there is evidence of material facts not previously presented, the application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

Section 17-27-90 provides that all grounds for relief must be raised in the original, supplemental or amended application. Any other ground finally adjudicated or not raised or knowingly waived 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.**" [emphasis added.]

Section 17-28-10 is the Access to Justice Post-conviction DNA Testing Act. Section 17-28-90(B) lists seven factors that the applicant must establish in order to be granted new DNA testing. The first factor is that the physical or biological evidence must be available. Factor Six provides that either the evidence was not subjected to DNA testing or "was previously subjected to DNA testing, but the requested DNA test would provide a substantially more probative result."

The PCR court erred in not granting Petitioner Harris an evidentiary hearing. The original incident happened in April 2001 and the trial was in 2003. DNA testing presumably improved between 2001 and 2012 when Harris filed an application for new DNA testing under the Access to Justice Act. He was seeking a more definite definition of the girl's DNA from the mixture as the expert said it could have been skin cells. Under the Access to Justice Post Conviction DNA testing Act, as provided in Factor Six, he may have been able to obtain "substantially more probative results." He was prejudiced by the destruction of the physical evidence in his case which occurred before his case was finalized. This was in error. South Carolina Code Section 17-28-320(C)[5] now prohibits the destruction of evidence for CSC cases until the person is released from incarceration.

The PCR court erred in counting the time for filing this 2014 PCR application from the date of the final decision of the 2004 appeal because Harris had been trying to prove his innocence during the years. He filed two PCR's and a federal habeas, and an application for new DNA testing. In addition, the destruction of the physical evidence in his case prohibited him from a chance at more improved new DNA testing. The only real evidence against him was the word of the child.

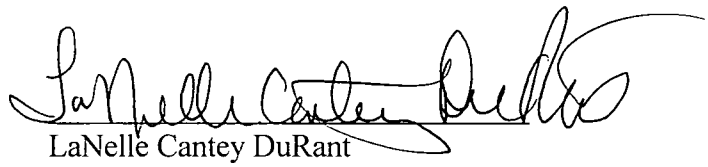
[5] Section 17-28-320 became effective January 1, 2009.

There is nothing in the record indicating that he did not know until 2013 that the evidence in his case had been destroyed. Therefore, he could not have filed earlier so he should not be penalized for not raising this earlier. He was not contacted and told that the evidence was being destroyed.

CONCLUSION

Based on the above, Petitioner should be granted an evidentiary hearing with an opportunity to propose that his due process rights were violated by the state's destruction of the DNA evidence.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of December, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
ROBIN B. STILWELL, CIRCUIT COURT JUDGE

RONALD HARRIS PETITIONER,

V.

STATE OF SOUTH CAROLINA, RESPONDENT

APPELLATE CASE # 2015-001451

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ronnie Harris states:

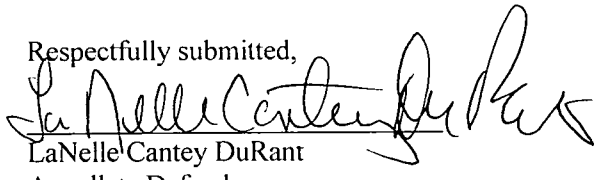
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on . In her opinion seeking certiorari from the order of dismissal is without merit.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Ronnie Harris.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
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This 21st day of December, 2015

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APPELLATE CASE # 2015-001451

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire and Ronnie Harris, #294716, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 21st day of December, 2015.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of December, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30,2022.