STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Anderson County

The Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2015-001560

JOHN BRADLEY TURNER, #290521, APPELLANT,

vs.

STATE OF SOUTH CAROLINA, RESPONDENT.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

PATRICK L. SCHMECKPEPER
Assistant Attorney General
SC Bar No. 102100

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court correctly determine that Appellant failed to state a claim upon which relief may be granted?

2. Did the circuit court abuse its discretion in denying Appellant's Writ of Mandamus, when Appellant was not entitled to a Writ, and was using Writ as a method to circumvent the procedural bars to successive post-conviction relief proceedings?

STATEMENT OF THE CASE

Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. Appellant was indicted at the September 2002 term of the Anderson County Grand Jury for murder (2002-GS-04-2531).[1] He was represented by Richard H. Warder, Esquire. On February 3, 2003, Appellant pled guilty as indicted. Appellant was sentenced by the Honorable J.C. Nicholson, Jr., to confinement for a period of thirty (30) years for murder.[2]

First PCR Application (2003-CP-04-2715)

Appellant subsequently filed an application for post-conviction relief (PCR) on September 4, 2003, in which he alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel; and
2. Involuntary guilty plea.

Respondent made its Return. An evidentiary hearing was convened on February 6, 2006, at the Anderson County Courthouse. Appellant was present and represented by Theo Mitchell, Esquire. Respondent was represented by Daniel Grigg, of the South Carolina Office of Attorney General.

The Honorable Alexander S. Macaulay denied and dismissed Appellant's application by written Order on March 24, 2006. Appellant subsequently filed a motion for reconsideration pursuant to SCRCP Rule 59(e), which was denied by Order dated December 19, 2006.

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[1] Appellant was also indicted for possession of a firearm during the commission of a violent crime (2002-GS-04-2530); and at the July 2002 term of the Anderson County Grand Jury for trafficking methamphetamine (2002-GS-04-1907), and manufacturing methamphetamine (2002-GS-04-1908). Appellant waived presentment to the grand jury on an additional charge of manufacturing methamphetamine (2002-Gs-04-0416). These indictments (and subsequent guilty pleas) are not contested or challenged in the current Petition.

[2] Judge Nicholson ordered Appellant's sentence for murder be run concurrently with his additional sentences for violation of the weapons provision and drug charges. Applicant's aggregate sentence is thirty (30) years.

Appellant filed a timely Notice of Appeal, and on October 18, 2007, the South Carolina Supreme Court denied Appellant's appeal. The Remittitur was issued on November 6, 2007.

Second PCR Application (2007-CP-04-3661)

Appellant then filed a second application for post-conviction relief on November 16, 2007, where alleged the following grounds for relief:

1. Ineffective assistance of counsel;
2. Due Process violation, Judge gave incorrect sentence information; and
3. Newly discovered evidence or prosecutor misconduct.

Respondent subsequently filed a Return and Motion to Dismiss. On December 4, 2007, a conditional order of dismissal was issued by the Honorable J. Cordell Maddox, Jr. Appellant made his response. On March 17, 2008, the Honorable Alexander S. Macaulay issued a final order denying the application. Appellant filed a Notice of Appeal. On October 7, 2009, the South Carolina Supreme Court dismissed Appellant's appeal. The Remittitur was issued on October 23, 2009.

Third PCR Application (2009-CP-04-4709)

Appellant filed his third application for post-conviction relief on December 2, 2009, where he alleged the following grounds for relief:

1. Ineffective assistance of PCR Counsel;
2. Newly discovered evidence of prosecutor misconduct;
3. Trial Judge gave incorrect sentence information.

Respondent subsequently filed a Return and Motion to Dismiss. On March 3, 2010, the Honorable Alexander S. Macaulay issued a conditional order, provisionally denying Appellant's application. Appellant made his response. On June 17, 2010, the Honorable R. Lawton McIntosh issued a final order denying the application. Appellant filed a Notice of Appeal. On

August 11, 2010, the South Carolina Supreme Court dismissed Appellant's appeal. The Remittitur was issued on May 4, 2010.

Federal Habeas Corpus Petition (1:10-cv-02433-TMC)

Appellant subsequently filed a Petition for Habeas Corpus on February 9, 2011, in Federal District Court in the Federal District of South Carolina. On January 17, 2012, the Honorable Timothy M. Cain dismissed the petition. In April, 2012, the Fourth Circuit Court of Appeals dismissed the subsequent appeal. Turner v. Warden of Perry Correctional Institute, No. 12-6171, Mandate and Judgment, Case No. 1:10-2433-TMC, Dkt.#s 60, 60-1 (4th Cir. April 25, 2012).

Current Petition for Writ of Mandamus

Appellant most recently submitted this petition on or about July 3, 2012, captioned "Writ of Mandamus Petition." Appellant requests this Court compel the Honorable J.C. Nicholson, Jr., who presided over his guilty plea, to issue an order "correcting" his term of imprisonment to eighty-five percent (85%) of his current sentence. In the alternative, Appellant seeks to have his pleas withdrawn, sentences vacated, and a new trial granted.

A hearing was convened on June 3, 2015, at the Anderson County Courthouse, before the Honorable Eugene C. Griffith, Jr. Appellant was present and represented by Robert Lusk, Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office. At the hearing, Appellant stated that Judge Nicholson informed him prior to his guilty plea that he would only serve eighty-five percent of his thirty (30) year sentence for murder. Appellant sought to enforce what he alleged to be an oral promise by Judge Nicholson. Appellant also stated that Judge Nicholson wrote a letter to him saying he misspoke regarding the eighty-five percent (85%) language. Finally, Appellant contended that he never

got to introduce evidence of his incorrect sentence in prior post-conviction relief proceedings and never got his full "bite at the apple." The court denied Appellant's petition by written Order filed July 10, 2015. Appellant filed a Notice of Appeal on or about July 15, 2015, and an Initial Brief of Appellant. This Initial Brief of Respondent follows.

ARGUMENT

1. The circuit court correctly determined that Appellant failed to state a valid claim upon which relief may be granted.

The Circuit Court correctly determined that Appellant failed to state a valid claim upon which relief could be granted.

Standard of Review

On appeal from the dismissal of a case for failure to state a claim, an appellate court applies the same standard of review as the trial court. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247

A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Rule 12(b)(6) SCRCP; Ashley River Properties I, LLC v. Ashley River Properties II, LLC, 374 S.C. 271, 277, 648 S.E.2d 295, 298 (Ct. App. 2007); Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct.App.2001). Dismissal of a complaint pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure is appropriate where, as here, the allegations set forth on the face of the complaint and inferences reasonably deducible therefrom, even when viewed in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, fail to state any valid claim for relief. Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874

(2006); Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999).

a. The Circuit Court correctly determined that Appellant is not entitled to a sentence alteration.

Appellant seeks reversal of the circuit court's decision denying his petition for a writ of mandamus, arguing first that he is entitled to an altered sentence because, he alleges, he relied on a purported misrepresentation of what his sentence for murder would be during his guilty plea proceedings.

Murder is a no-parole offense with a "mandatory minimum term of imprisonment for thirty years to life." S.C. Code Ann. §§ 24-13-100, 16-1-10(D), 16-3-20(A). Judge Nicholson sentenced Petitioner to thirty (30) years imprisonment for murder. Petitioner argues that he was misinformed and led to believe that he would only have to serve eighty-five (85%) of his sentence. However, under the current law of South Carolina, Petitioner received the *absolute minimum* sentence for murder. Additionally, because murder is a "no-parole" offense, he is not eligible for work release, early release, discharge, or community supervision, as a matter of law, and thus is statutorily required to serve the entire sentence. Even assuming this Court was able (and willing) to issue an order requiring Judge Nicholson to alter Petitioner's sentence, such an alteration below the minimum sentence is not within the power and authority vested with a Circuit Court Judge. Accordingly, the circuit court's decision should be affirmed.

b. A Writ of Mandamus is not the proper remedy for the relief Appellant seeks.

The Circuit Court correctly determined that Appellant's claim falls under the Uniform Post-Conviction Procedure Act (PCR Act). S.C. Code Ann. §§ 17-27-10 to -160 (2014). The PCR Act "comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence," and "shall be

used exclusively in place of them." § 17-27-20(B); see also Simpson v. State, 329 S.C. 43, 46-47, 495 S.E.2d 429, 430-31 (1998) (holding state habeas corpus petition was properly dismissed where the allegations were clearly cognizable under the PCR Act). Appellant's claims are clearly cognizable under the PCR Act, as evidenced in part by their inclusion in several of Appellant's prior PCR applications. Moreover, his claim that his guilty plea was involuntary based on misrepresentations by Judge Nicholson, as well as his plea counsel, are clearly cognizable under the PCR Act. § 17-27-20(A)(1) (Including claims that "the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State."). Accordingly, this claim is not properly before this Court as a Writ of Mandamus and the circuit court's decision should be affirmed.

2. **The circuit court did not abuse its discretion when it denied Appellant's Writ of Mandamus, when Appellant was not entitled to a Writ, and was using Writ as a method to circumvent the procedural bars to successive post-conviction relief proceedings.**

Respondent submits that the court did not abuse its discretion in dismissing the Appellant's Petition. The writ of mandamus is the highest judicial writ known to the law and according to long approved and well established authorities, only issued in cases where there is a specific legal right to be enforced or where there is a positive duty to be performed.

A mandamus will be issued only to compel a public official to perform a mandatory duty. State v. Ansel, 76 S.C. 395, 414, 57 S.E. 185 (1906); Lombard Iron Works v. Town of Allendale, 187 S.C. 89, 196 S.E. 513 (1938). The primary purpose of a writ of mandamus is to enforce an established right, and to enforce a corresponding imperative duty created or imposed by law. Charleston County School District v. Charleston County Election Commission, 336 S.C. 174, 519 S.E.2d 567 (1999). To obtain a writ of mandamus requiring performance of an act, an Appellant must show that the opposing party has an indisputable and plainly defined duty to perform the act, the ministerial nature of the act, the opposing party's specific legal right for which discharge of the duty is necessary, and the lack of other legal remedy. Id. at 282. The writ of mandamus lies solely within the discretion of the court of which it is requested. In Interest of Lyde, 284 S.C. 419, 327 S.E. 70 (1985). Moreover, mandamus is unavailable where the legal right is doubtful. Id.

The Circuit Court correctly found that Appellant has no specific legal right to a reduction in sentence where he has already received the mandatory minimum term of imprisonment for his offense. Respondent would further emphasize that sentencing is not a ministerial act, but one that is inherently discretionary in nature. See, e.g., Brooks v. State, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997) ("A trial judge is allowed broad discretion in sentencing within statutory

limits"); Wilson v. Preston, 378 S.C. 348, 354, 662 S.E.2d 580, 583 (2008) ("[A] duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts. It is ministerial if it is defined by law with such precision as to leave nothing to the exercise of discretion. In contrast, a quasi-judicial duty requires the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued" (internal citations omitted)). Respondent would also point out that the subject of the actual Writ – Judge Nicholson – has neither the duty *or the power*[3] to take the action requested by Appellant. Even if Judge Nicholson could be conferred with jurisdiction to issue a new sentence, he does not have the authority to issue a sentence below the mandatory minimum set by statute. Brooks, supra. Finally, as stated in the previous section, there are well-established methods for challenging a conviction or sentence, through direct appeal and post-conviction relief. Appellant also has Federal avenues for relief, where he may be able to raise claims that are procedurally barred in State court. See Martinez v. Ryan, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) ("Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective"). Because Appellant has not met any of the required elements, Respondent submits the Circuit Court correctly denied his Petition for a Writ of Mandamus. Accordingly, its ruling in the matter should be affirmed.

[3] Judge Nicholson does not have jurisdiction to alter Appellant's sentence. See State v. Campbell, 376 S.C. 212, 215, 656 S.E.2d 371, 373 (2008) (noting the "long-standing rule of law that a trial judge is without jurisdiction to consider a criminal matter once the term of court during which judgment was entered expirees," except for post-trial motions filed within ten days pursuant to Rule 29 of the South Carolina Rules of Criminal Procedure).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the decisions of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

February 5, 2016.

STATE OF SOUTH CAROLINA

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Appeal From Anderson County
Eugene C. Griffith, Jr., Circuit Court Judge

JOHN BRADLEY TURNER, Appellant

v.

Respondent.

STATE OF SOUTH CAROLINA,

PROOF OF SERVICE

I, Lakesicha Gibbs, certify that I have served the within **Initial Brief of Respondent and Designation of Matter** on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: William G. Yarborough, III., Esquire, 522 North Church Street, Greenville, SC 29601

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

This 5th day of February, 2016.

Lakesicha Gibbs
Legal Assistant
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ALAN WILSON
ATTORNEY GENERAL

February 5, 2016

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: **John Bradley Turner v. State of South Carolina**
Appellate Case No: 2015-001560

Dear Ms. Kitchings:

Enclosed please find the original of the **Initial Brief of Respondent and Designation of Matter** in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this brief today.

Sincerely,

Patrick Schmeckpeper
Assistant Attorney General
Bar No: 102100

PS/lg
Enclosures

cc: William G. Yarborough, III, Esquire (2 copies enclosed)
Trisha Allen, Victim Services (1 copy enclosed)