

State of South Carolina)	Court of Common Pleas
)	
County of Spartanburg)	C/A 2014-CP-42-4530
)	
Charles M. Dominick, #334038,)	
Appellant,)	APPELLANT'S
)	243(c) EXPLANATION
v.)	
)	
State of South Carolina,)	
Respondent.)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed November 4, 2014. The Respondent made its return on or about April 22, 2015, requesting the application be summarily dismissed based upon expiration of the statute of limitations. The presumption against successive applications and for failure to make a prima facie showing that he is entitled to relief based on newly discovered evidence.

The appellant's issue have not been previously presented that requires vacation of my conviction and sentence. Appellant made the discovery on or about 9-11-13. Shortly after making this discovery, appellant now file this second PCR application on November 4, 2014, pursuant to the "Discovery Rule" in accordance to S.C. Code Ann. §17-27-45(c); McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (S.C. 2013). Appellant's Due Process violation and newly and after discovered evidence was timely filed and an evidentiary hearing should be held with the appointment of counsel to assist the appellant in this matter because genuine issues of material fact exist; which was brought to the appellant's attention by a trained law clerk.

The appellant alleged errors has not been previously and finally litigated or waived in the proceedings resulting in the conviction or in any other proceeding that the petition has taken to secure relief from his conviction.

Allegations in appellant's PCR application must be deemed true until those allegations are controverted by the state. Until allegations contained in verified application for PCR are controverted by the state, they are deemed to be true for purpose of determining whether evidentiary hearing should be held.

The appellant will present clear and convincing evidence to grant a PCR hearing by rebutting the Respondent's/Attorney General's factual findings. Our South Carolina Supreme Court has made it abundantly clear that a PCR proceeding is still a constitutionally protected and statutorily provided mechanism to address a denial of fundamental fairness shocking to the universal sense of justice.

Appellant adopts the court's procedural history in the Final Order of Dismissal.

However, the court denied and dismissed with prejudice the instant PCR application as successive. Appellant submit the basis of instant application is premised on a due process violation and newly and after discovered evidence. Appellant would submit he has never had hi "one bite of the apple" due to ineffective assistance of PCR counsel in that regards.

The appellant would show this Honorable Court that his PCR application that was submitted to the lower court should not be successive and barred by statute of limitations for the following reasons!

The respondents pointed out that these issues could have been raised in the prior adjudication, however, state statutory PCR counsel failed to ensure all available grounds for relief were included in the original application, thus ensuring that [all] available grounds for relief be raised in the initial application; thus resulting in an inadequate corrective process and any default should be imputed to the state.

Appellant asserts the instant application should not be dismissed as successive, but rather an evidentiary hearing should be convened to determine whether or not appellant has a statutory created liberty interest in South Carolina PCR actions, Rule 71.1(d) SCRPC., Appointment of Counsel. The present application should not be dismissed as successive. It is the state who bears the burden of a procedural default on any claims that should have been raised in the original application and presented to the PCR court for consideration in Rule 71.1(d), SCRCR states:

(d) Appointment of counsel for hearing.

If after the state has filed it's return the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given reasonable time to

confer with the applicant. Counsel shall ensure that all grounds for relief are included in the application and shall amend the application if necessary.

The word shall is considered mandatory, See e.g. South Carolina Police Officer Retirement System v. Spartanburg, 301 S.C. 188, 391 S.E.2d 239 (1990)(shall is considered mandatory under the principles of statutory interpretation); S.C. Dept. of Hwy & Public Transportation v. Dickinson, 258 S.C. 189, 191 S.C. 341 S.E.2d 135, ordinarily the use of the word shall in a statute means that the action referred to is mandatory. The duty is on the applicant to show a duty of care was owed to him, Rayfield v. SCDC, 297 S.C. 95, 105-106, 374 S.E.2d 910, 916 (Ct. App. 1988), cert denied 298 S.C. 207, 379 S.E.2d 133 (1989). An affirmative legal duty may be created by a statute, contract relationship, status, property interest, or some other special circumstance, Arthur v. Aiken County, 338 S.C. 253, 525 S.E.2d 542, 547 (S.C. App. 1999)!

An affirmative legal duty here is created by the S.C. Constitution Art. 1 § 3; S.C. Code Ann. §17-27-60 (2003) and Rule 71.1(d) SCRPC.

The South Carolina provisions here create a liberty interest in the 6th Amendment right to effective assistance of counsel, via the 14th Amendment. Applicant had a legitimate claim of entitlement to counsel as created and determined by reference to S.C. State law. These laws make it clear that the appointment of counsel in the first-initial-review collateral proceeding (PCR) is not discretionary.

It was appointed PCR counsel's professional obligation to ensure that all available grounds for relief were raised in at the first-initial review collateral proceeding (PCR), anything short of that is scrutinized under §17-27-90, and thus should be imputed to the state. Applicant had the burden of proof at the initial PCR hearing, Rule 71.1 SCRPC. This encompasses and securing the right under Rule 71.1(d) that appointed PCR counsel shall ensure all available grounds will be raised in the first PCR application...counsel is appointed just for this reason and thus has a duty to represent the client. Without the constitutional duty of effective assistance in this regard, the PCR procedure itself is ineffective and runs afoul

of the United States Supreme Court's 14th Amendment directive that the states employ an adequate PCR remedy to present federal constitutional claims, See, Case v. Nebraska, 381 U.S. 336 (1965).

The U.S. Supreme Court incorporates into the 14th Amendment, any guarantee which is fundamental in the context of the [judicial] process maintained by the American states, Duncan v. Louisiana, 391 U.S. 145 (1961).

To not apply the 6th Amendment where it is a fundamental guarantee constitutionally and statutorily created and maintained by the State of South Carolina for first time post-conviction applicant's, especially in the context of PCR being the first appeal, following a guilty plea, applies to the State of South Carolina, a watered-down, subjective version of those individuals guarantees of the Bill of rights.

The failure of applicant's first PCR counsel to ensure that [all] grounds for relief are included in the first PCR application is plainly ineffective assistance of counsel. Washington v. State, 324 S.C. 232, 478 S.E.2d 833, 835 (S.C. 1996)(ineffective assistance of PCR counsel).

All PCR applicant's are entitled to a "full and fair" opportunity to present claims in one PCR application. Applicant submits he was denied his "first bite of the apple", due to ineffective assistance in the first initial review (PCR) proceeding.

Appellant's ability to present claims of constitutional violations in both South Carolina State and Federal Courts should not be abridged merely because he has unwittingly fallen into a procedural trap created by the intricacies of state statutory appointed PCR counsel.

Appellant asserts that he has a created liberty interest in statutory state appointed PCR counsel, and therefore his rights were violated when PCR counsel failed to insure that all grounds for relief were included in the original PCR application to allow appellant a full and fair hearing to present his newly and after discovered federal constitutional claims. Appellant has a liberty created interest in state statutory appointed PCR counsel. The appellant have established that the grounds raised in the subsequent application could not have been raised in the previous application because of PCR counsel. Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999).

First PCR counsel J. Falkner Wilkes misinformed me that I did not have any witnesses that would testify upon my behalf at my first PCR hearing. SEE: E x A "SWORN AFFIDAVIT of JAMES BYRD" which meet "All 5 points of newly discovered evidence per. but not limited to State v. Mercer, 672 S.E.2d 556; State v. Needs, 508 S.E.2d 857; State v. Prince, 447 S.E.2d 177; State v. Ford, 392 S.E.2d 781.

And due to the unique facts and extraordinary circumstance in this PCR application; (1) Which would probably change the result if a new trial, and PCR were granted where the PCR Judge found that the Applicant had shown that there did exist certain facts which could have been used by him and his counsel if they had raised the defense of SELF-DEFENSE.

Which this NEWLY DISCOVERED EVIDENCE shows that trial counsel was in fact ineffective for not talking to me upon any self-defense levels. And, that my PCR counsel undermined my DUE PROCESS which also shows that any of my issue(s) could not have been raised in my first PCR. Thus, the one year statute of limitations nor the successive statute applies here. Moreover, my current PCR is brought timely per 17-27-45 (c).

I argue that PCR counsel clearly undermined my due process. See, Martinez v. Ryan, 132 S.Ct. 1309, which my first PCR hearing can not be relied upon as having produced a just result. Which PCR counsel knew as an officer of the court that I was required to produce my witnesses at my PCR hearing. Beaver v. Thompson, 93 F.3d 1186; Bassette v. Thompson, 915 F.2d 932; Bannister v. State, 509 S.E.2d 807; Glover v. State, 458 S.E.2d 538; Smith v. State, S.E.2d ____ 2012 WL 386620 (Ef. ppp. 2012).

Moreover, I could not have called any witnesses without the aid of PCR counsel thus, I argue that due to the facts and circumstances of my claim - which the interest of justice so requires this court to review "all" my claims. Because I have shown facts to over come. Aice v. State, 409 S.E.2d 392.

And here, there may be genuine issues of material fact(s), that exist as to whether my PCR claim(s) are untimely, successive or has been fully adjudicated on the merits in this current PCR, which does not apply in my case.

If it were not for my PCR counsel's acts and omissions,

the outcome of my initial PCR would have been different.

CONCLUSION

Wherefore based on the foregoing, Appellant respectfully moves this Honorable Court to set aside the Final Order of Dismissal of the Lower Court and allow the instant PCR application to proceed on the merits of the underlying claim that has not been presented to any other court.

I, Charles M. Dominick, #334038, certify and verify under the penalty of perjury that the foregoing is true and correct, 28 U.S.C.A § 1746.

Charles Dominick
Charles M. Dominic, #334038

THE STATE OF SOUTH CAROLINA

SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

COURT OF COMMON PLEAS

C/A #2014-CP-42-4530

Charles M. Dominick.....Appellant,

v.

State of South Carolina.....Respondent.

PROOF OF SERVICE

d

I, Charles M. Dominick, certify that I have served my Rule 243(c) Explanation on the Respondents by depositing a copy of the same in the PCI mailroom hands for mailing, postage prepaid addressed as follows:

Daniel Shearouse
Clerk of South
Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Alicia A. Olive
Asst. Att. General
P.O. Box 11549
Columbia, S.C. 29211

I, Charles M. Dominick, #334038, certify and verify under the penalty of perjury that the foregoing is true and correct.
28 U.S.C.A §1746.

Charles Dominick
Charles M. Dominick, #334038

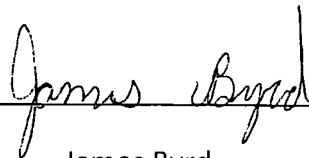
Affidavit Statement

I, James Byrd being duly sworn under penalty of perjury state that the foregoing facts are true and correct in compliance with 28 U.S.C. 1746. The stated affidavit herein was not made by force, promise, nor offered anything in value in return. I voluntarily make and state with knowledge as follows:

On November 11th, 2006, I was outside in the parking lot of Club Liquid in Spartanburg, SC, when I heard one gunshot. As I turned around, I saw gunfire/shots coming from a blue Ford Crown Victoria and the shots were aimed and going towards a person I know as Charles Dominick. I then saw Charles return fire back at the blue Ford Crown Victoria and began to hide for cover. I stayed and spoke with an officer about what I had just witnessed. After I learned that Charles had been charged for the incident, I spoke with Charles and told him if called I would testify to what I witnessed, the night of November 11th, 2006.

Date 9/11/13

Signature

A handwritten signature in cursive script that reads "James Byrd". The signature is written over a horizontal line.

James Byrd