

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable J. Mark Hayes, Circuit Court Judge

RECEIVED

AUG 31 2016

S.C. SUPREME COURT

JAMES BOGAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000323

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

The PCR judge erred in failing to hold a hearing on petitioner's behalf as required under Coats v. State¹ and Sharper v. State², and in dismissing petitioner's PCR action as untimely filed because counsel's misadvice on the subject of parole eligibility/ineligibility was a valid PCR claim containing newly discovered material that was timely presented in a PCR action filed by petitioner within one year of the date of the discovery of the same as required per S.C. Code Ann. § 17-27-45(c).

¹ 352 S.C. 500, 575 S.E.2d 557 (2003).

² 279 S.C. 264, 305 S.E.2d 247 (1983).

STATEMENT

Petitioner James Nelson Bogan pled guilty to second degree burglary and petty larceny during the June 2011 term of the Spartanburg County General Sessions Court before Judge Roger L. Couch and was sentenced to imprisonment for an aggregate period of fifteen years. James Cheek represented petitioner at the plea proceeding, and Assistant Solicitor Michael Morin appeared on behalf of the state. App. 1-28. Petitioner did not enjoy the benefit of a direct appeal in his case.

On April 10, 2013, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 30-37. On July 18, 2014, the respondent filed a Return and Motion to Dismiss contending that petitioner's PCR action was not timely filed within the one-year deadline after his conviction date pursuant to Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). App. 38 – 40.

On July 18, 2014, Judge J. Derham Cole issued a Conditional Order of Dismissal echoing the identical ground for dismissal presented in the Return and Motion to Dismiss to the extent that petitioner's action should be dismissed as untimely filed outside the one-year deadline despite his newly discovered parole ineligibility claim and the accompanying inference that trial counsel erred in misadvising him on the issue of parole eligibility. App. 42 - 45.

On April 14, 2014, petitioner filed "Applicant's Opposition to the Court's Conditional Order" therein arguing that trial counsel erred in advising that he was parole eligible when in fact he was not parole eligible, which was newly discovered evidence that he subsequently learned of via SCDC, and that per Coats v. State, 352 S.C. 500, 575 S.E.2d 557 (2003), he was entitled to a hearing on the parole eligibility/ineligibility issue despite the one-year statute of limitations on filing PCR actions because he filed a timely a PCR application within the one-year deadline

required for raising newly discovered material that was not previously discoverable. App. 46 – 54.

On January 26, 2016, Judge R. Keith Kelly issued a Final Order dismissing petitioner’s PCR action as untimely filed. App. 55 – 57. This petition follows.

ARGUMENT

The PCR judge erred in failing to hold a hearing on petitioner’s behalf as required under Coats v. State³ and Sharper v. State⁴, and in dismissing petitioner’s PCR action as untimely filed because counsel’s misadvice on the subject of parole eligibility/ineligibility was a valid PCR claim containing newly discovered material that was timely presented in a PCR action filed by petitioner within one year of the date of the discovery of the same as required per S.C. Ann. § 17-27-45(c).

S.C. Code Ann. §17-27-45(a) and Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996), require PCR actions to be filed within one year of a judgment of conviction. Petitioner pled guilty as charged on June 22, 2011, but filed his PCR action on April 10, 2013, because it was not until March 27, 2013, that he learned from SCDC that he was parole ineligible, which was contrary to trial counsel’s advice that he would become parole eligible during his incarceration. This newly discovered material could not have been discovered previously. In such a circumstance as this, S.C. Code Ann. § 17-27-45 (c) allows for a newly discovered PCR claim regarding evidence of material facts not previously presentable on PCR to be accepted if it is filed within one year of the actual date of discovery of the same.

³ 352 S.C. 500, 575 S.E.2d 557 (2003).

⁴ 279 S.C. 264, 305 S.E.2d 247 (1983).

In the case at bar, petitioner discovered that he was parole ineligible on March 27, 2013, which was also the date he realized that trial counsel improperly advised him regarding parole eligibility/ineligibility at his plea proceeding held on June 23, 2011, and that upon learning of this newly discovered parole information, he went on to submit a timely filed PCR action within one year of the discovery of his newly apprised parole ineligible status. When petitioner was informed by SCDC on March 27, 2013, that he was not parole eligible, he filed a PCR application regarding the parole ineligibility matter on April 10, 2013, which was well within the one-year deadline to do so when newly discovered material PCR claims must be raised. Thus, petitioner satisfied the time limits to filing a PCR action in a PCR case involving newly discovered material. The one-year filing rule in PCR cases under Peloquin was inapplicable to petitioner's case.

Petitioner's case is similar to Coats v. State, 352 S.C. 500, 575 S.E.2d 557 (2003), where the Court held that Coats, who claimed counsel erred in improperly advising him that he was parole eligible when in fact he was not parole eligible, and filed a timely PCR action within one year of discovering this material fact, i.e. his parole ineligibility, was not subjected to the Peloquin rule and thereby entitled to a PCR hearing on the parole eligibility/ineligibility PCR claim. Likewise, petitioner's parole eligibility and/or ineligibility PCR claim, which could not have been discovered when he pled guilty on June 22, 2012, did not fall under the Peloquin deadline; and therefore, the state's argument that petitioner missed the one-year Peloquin deadline to file his PCR action lacked merit because petitioner did not learn that he was parole ineligible, which was contrary to counsel's advice to him, until March 27, 2013, when SCDC advised him of his parole ineligible status. Then, petitioner filed his PCR action within one year after learning of his parole ineligibility status. See also Tilly v. State, 334 S.C. 24, 511 S.E.2d

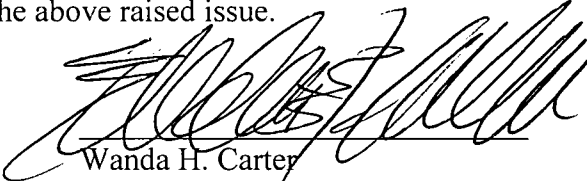
689 (1999), where the Court held that Tilly's parole eligibility PCR claim was reviewable and not prohibited as successive since he could not have raised such a claim previously until the same was discovered.

Since petitioner's parole ineligible status was newly discovered material that could not have been presented in a prior PCR action within a year of his conviction, he properly filed a timely PCR action within one year as required in reference to newly discovered material that was uncovered in his case under S.C. Code Ann. § 17-27-45 (c) and as a result, a hearing in the matter should have been held. In Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983), the Court held that a hearing must be held when a PCR claim that challenges a specific instance of ineffective assistance of counsel that is not conclusively refuted by the record and raises a question of fact that can only be resolved by an evidentiary hearing.

Therefore, based on the subsequent discovery and nature of petitioner's parole ineligibility claim, the PCR court erred in denying petitioner's right to a PCR hearing in the matter and in dismissing his PCR action as untimely filed.

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this Court grant the petition and allow full briefing on the above raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of August, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable J. Mark Hayes, Circuit Court Judge

JAMES BOGAN,

PETITIONER,

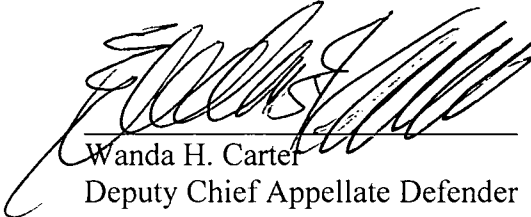
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on James Nelson Bogan, #288111, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 31st day of August, 2016.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 31st day of August, 2016.

 (L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.