

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Post Conviction Relief

William H. Seals, Jr., Circuit Court Judge

Appellate Case No.: 2016-000899

RECEIVED

DEC 28 2016

S.C. SUPREME COURT

Marcus Skeeters, #199165, Petitioner,

vs.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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McCoy v. State, 401 S.C. 363, 737 SE2d 623 (2013)

Skeeters v. State, Op. No. 03-MO-007 (S.C. filed February 10, 2003)

State v. Skeeters, Op. No. 95-MO- 149 (S.C. filed March 29, 1995)

South Carolina Code of Law

§17-27-45 (a) South Carolina Code of Law

§17-27-90 South Carolina Code of Law

§24-21-640 South Carolina Code of Laws

South Carolina Rule of Civil Procedure 59(e)

QUESTION PRESENTED

- I. Did the PCR Court err in dismissing the Appellant's Post-Conviction Relief Action as being successive to the previous applications for Post-Conviction Relief and out of time?

STATEMENT OF THE CASE

The Appellant is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Horry County. In August 1993, the Appellant was indicted for murder, four (4) counts of assault and battery with intent to kill, and unlawful possession of pistol by a felon. A trial was held August 9-10, 1993, at which the Appellant was found guilty on all counts by a jury impaneled before the Honorable Sidney T. Floyd. The Appellant was represented by Orrie E. West, Esquire, Chief Public Defender. Sentencing was conducted on August 10 and 11, 1993, and Appellant was sentenced to life imprisonment for murder, ten (10) years for assault and battery of a high and aggravated nature (as a lesser included crime of the charge of assault and battery with intent to kill), twenty (20) years on each of the other three (3) counts of assault and battery with intent to kill, and one (1) year for the weapon charge, running consecutively.

A timely notice of appeal was filed on Appellant's behalf, and an appeal was perfected. Appellant was represented by M. Ann Pearce, Assistant Appellate Defender of the South Carolina Office of Appellate Defense. The South Carolina Supreme Court affirmed Appellant's conviction on March 29, 1995. State v. Skeeters, Op. No. 95-MO- 149 (S.C. filed March 29, 1995). The remittitur was returned to the circuit court on April 14.

A. First Post-Conviction Relief Action (1996-CP-26-0002)

In January 1996, Appellant filed an application for post-conviction relief alleging the necessity of relief on the following grounds:

1. Appellant was denied the right to effective assistance of counsel as guaranteed by the sixth amendment due to trial counsel not properly investigating the case and not procuring witness statements;
2. Appellant was denied the right to effective assistance of counsel as guaranteed by the sixth amendment due to trial counsel depriving defendant of a fair trial;

3. Appellant was denied the right to effective assistance of counsel as guaranteed by the sixth amendment due to trial counsel's failure to object to a charge or request an additional charge at trial.

The State filed its return in November 1997. Appellant filed an amendment along with supporting documents that was transmitted to the court by William M. Bruner, Esquire shortly before the evidentiary hearing. The Honorable James E. Lockemy held an evidentiary hearing on February 24, 1998. Both Appellant and his former trial attorney testified. Judge Lockemy denied relief in a written order dated May 13, 1998. A motion to alter or amend under South Carolina Rule of Civil Procedure 59(e) was filed on July 6, 1998, and was denied.

Appellant filed a petition for a writ of certiorari, and was represented by Joseph L. Sanitz, Deputy Chief of the South Carolina Office of Appellate Defense. The Supreme Court of South Carolina granted the petition and ordered additional briefs on December 13, 2001. The Supreme Court dismissed the grant of writ of certiorari as improvidently granted on February 10, 2003. Skeeters v. State, Op. No. 03-MO-007 (S.C. filed February 10, 2003). The remittitur was returned to the circuit court on February 26, 2003.

B. First Federal Habeas Corpus Action (0:04-cv-411(MJP-BM))

Appellant filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina on February 10, 2004, seeking relief on the ground that "counsel was ineffective when she failed to request an instruction on transferred intent as it related to manslaughter, and failed to object to the instruction to preserve the objection for the record." It was filed against Jon Ozmint, Warden of Lee Correctional Institution, and Henry McMaster, Attorney General for the State of South Carolina. On May 5, 2004, the State filed a motion for summary judgment. On January 13, 2005, the Honorable Bristow Marchant, United States Magistrate Judge, issued a report and recommendation to grant the motion for summary judgment and

dismiss the petition because the issue presented was procedurally defaulted. Appellant filed objections and a motion to stay proceeding or, in the alternative, dismiss the petition without prejudice by and through his attorney, Joshua Snow Kendrick, Esquire, on January 28, 2005. The State, as Respondent, filed a Return on February 7, 2005. The Honorable Matthew J. Perry issued an order on April 5, 2005 adopting the Magistrate's recommendation, granting the Respondents' motion for summary judgment, and dismissing the matter without prejudice. Respondents filed a Rule 59(e) motion to alter or amend the judgment on April 18, 2005 requesting that it show a dismissal with prejudice. An amended summary judgment order was issued on April 26, 2005, removing the word "without," and stating that "...this petition is dismissed."

C. Second Post-Conviction Relief Action (2005-CP-26-2846)

In June 2005, Appellant filed a second application for post-conviction relief by and through his counsel, Mr. Kendrick. He again claimed that he had not received effective assistance of counsel at trial, but argued that it should be distinguished under Aice v. State 305 S.C. 448 (1991) as being a proper instance for a successive petition because it was not properly presented to the highest state court and therefore procedurally barred from review by federal courts. The State filed its return on December 15, 2005, and amended return and motion to dismiss on December 5, 2007. A conditional order of dismissal was filed on December 26, 2007 after being signed by the Honorable J. Michael Baxley on December 19, 2007. Appellant refused personal service of the conditional order, but was served by mail, and did not issue any response or objection. A final order of dismissal was signed on March 5, 2008, also by Judge Baxley.

D. Second Federal Habeas Corpus Action (0:06-797-RBH-BM)

Appellant filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina on March 10, 2006, by and through his counsel, William Isaac Diggs,

Esquire. It was filed against Jon Ozmint, Warden of Lee Correctional Institution, and Henry McMaster, Attorney General for the State of South Carolina. Appellant again alleged "ineffective assistance of counsel due to counsel's failure to request an additional jury instruction on the issue of transferred intent with respect to manslaughter." Respondent also filed a memorandum in support of this petition, filed on March 30, 2006. On May 8, 2006, the State filed a motion for summary judgment, accompanied by a return and memorandum of law. Appellant filed a return to this motion on May 26, 2006. On November 21, 2006, the Honorable Bristow Marchant, United States Magistrate Judge, issued a report and recommendation to grant the motion for summary judgment and dismiss the petition. Appellant filed objections by on December 1, 2006. The Honorable R. Bryan Harwell issued an order on January 7, 2007 adopting the Magistrate's recommendation, granting the Respondents' motion for summary judgment, and dismissing the matter with prejudice.

STATEMENT OF THE FACTS

On May 22, 2015, the Appellant filed an application for Post-Conviction Relief (R. p. 1). This application is based on the fact that in a letter dated September 8, 2014, the applicant was informed that he was no longer eligible for parole on the basis that he was a subsequent violent offender. The Board decision was based on §24-21-640 South Carolina Code of Laws. The two violent crimes were cited as Murder, and Assault and Battery with Intent to Kill (93-GS-26-1396) sentence date August 10, 1993 and a Youthful Offender sentence of Assault and Battery with Intent to Kill (91-GS-26-1263) sentence date August 5, 1991. The Appellant had previously been up for parole and rejected on two separate occasions.

The Appellant alleged that he had been offered a plea bargain in the 1993 case and had rejected the offer and proceeded to trial. That had he known that his exposure, if found guilty, was

life without parole, that he would have accepted the plea offer. The Application for Post-Conviction Relief was filed within one (1) year of discovery of this situation.

A Return and Motion to Dismiss was filed by the State dated July 22, 2015 (R. p. 20). A Conditional Order of Dismissal was filed on August 11, 2015 (R. p. 28). A Return to the Conditional Order of Dismissal was filed on August 27, 2015 (R. p. 35). A final Order of Dismissal was filed on March 30, 2016 (R. p. 46).

This Appeal follows:

ARGUMENT

As pointed out by the procedural history, the Appellant has had two Post-Conviction Relief actions as well as two Federal Habeas Corpus actions. All four of these actions were dismissed with prejudice. The last action being filed in the United States District Court for the District of South Carolina on March 10, 2006. Despite these actions being unsuccessful, the Appellant always had the belief that he would be eligible for parole. In fact, he went up for parole in 2012. He was notified November 15, 2012 that he had been rejected for parole and that he would be notified thirty days prior to his next scheduled parole consideration date. (R.p. 43). On September 8, 2014, the Appellant was notified by legal counsel for the Department of Probation, Parole and Pardon Services, that he was not eligible for parole as a result of being a subsequent violent offender. This denial was pursuant to §24-21-640 South Carolina Code of Laws, as Amended. (R.p. 44).

The Court found in its Order of Dismissal that pursuant to §17-27-90 South Carolina Code of Law, a successive Post-Conviction Relief Applications is forbidden. That successive Applications are forbidden unless the Appellant, who bears the burden of proof, can point to a sufficient reason why new grounds for relief were not properly raised in previous applications. Aice v. State, 305 SC 448, 409 SE 2d 398 (1991).

The Court further found and concluded that the sole grounds that the Appellant alleges should have been known to him at the time of his prior Applications for Post-Conviction. The Appellant would assert that the issue of parole eligibility could not be known to him until such time as he received the notification from Probation and Parole. He was told that he would be eligible for parole and in fact possessed a parole eligibility date during his incarceration with the South Carolina Department of Corrections. He appeared before the parole board in November,

2012 and was denied parole. Pursuant to his letter regarding his parole rejection, it was indicated that he would be notified thirty (30) days prior to his next scheduled parole consideration date. (R.p. 43). The Appellant had no ability to ascertain or determine that he was not eligible for parole until such time as he received the letter from Probation and Parole, dated September 8, 2014, stating that he was a subsequent violent offender (R.p.44) . After receipt of this letter, a timely Application for Post-Conviction Relief was filed (R.p. 1).

The Court further found and concluded that the Appellant's Application for Post-Conviction Relief was not timely filed quoting §17-27-45 (a) Application for relief must be filed within one year after the entry of Judgment of Conviction or within one year from the sending of the Remittitur from the Lower Court from an Appeal. The Appellant would assert that upon gaining knowledge that he was ineligible for parole from the South Carolina Department of Probation, Parole and Pardon Services on September 8, 2014 (R.p. 44) that he timely filed a Post-Conviction Relief Action on May 22, 2015 (R.p. 1). This filing being within the one year statute of limitations.

The Court found and concluded that the Appellant's Petition creates no genuine issue of material fact and the Respondent is therefore entitled to Judgment as a matter of law. The Appellant would assert that there is a genuine issue of material fact. The Appellant was informed at Trial that he would be eligible for parole. That this understanding was held by him through his incarceration with the Department of Corrections. That he had a parole eligibility date while waiting for parole. That he appeared before the parole board in November, 2012. That he was notified that he would be eligible for parole on a subsequent date and that he would be notified thirty (30) days prior to his next scheduled parole consideration (R. p. 43). That it was only in September, 2014 that he was notified that he was ineligible for parole (R.p. 44).

This notification, in essence, changed his life sentence to a pure life sentence without parole. Pursuant to this change, he has no ability to be released from the South Carolina Department of Corrections, until his death.

The Appellant is informed and believes that this is a material issue and that he is entitled to an evidentiary hearing. Had he known this information at the time of trial, he would have accepted the State's plea and he would have had a release date from the South Carolina Department of Corrections. He would not be serving a life without parole sentence.

A Defendant requesting a new trial based on after discovered evidence must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E. 2d 854, 855 (1983).

The Appellant contends that this new evidence meets the above criteria. Until he was provided the letter from Probation and Parole dated September 8, 2014, (R.p. 44), there is no way in which he could have known or been able to discover this information.

In this matter there is a genuine issue of material fact regarding the after discovered evidence and the issue of whether the Application is successive or untimely filed.

The Summary dismissal of a PCR Application is appropriate only when it is apparent on the face of the Application that there is no need for a hearing to develop any facts and the Appellant is not entitled to relief. McCoy v. State, 401 S.C. 363, 737 SE2d 623 (2013).

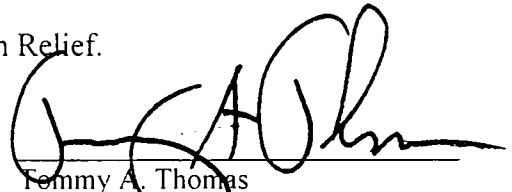
In addition the Appellant would assert that there is also an issue of improper use of the YOA sentence. Upon his plea to the YOA charges, he received a 1-6 indeterminate YOA

sentence. This plea and sentence is more consistent with an Assault and Battery charge which is not a violent offense. Rather than the Assault and Battery with Intent to Kill as noted by Probation and Parole. (R.p. 44)

The Appellant's current sentence is his first adult sentence. The Appellant believes that he is entitled to proceed to an evidentiary hearing to present the facts concerning the ineffective assistance of counsel regarding the trial and conviction as well as the Application of the YOA sentence to his subsequent violent offender determination.

CONCLUSION

Therefore, based upon the foregoing arguments the Petitioner respectfully requests that the Court grant the Petitioner's request for Post-Conviction Relief.



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December 28, 2016

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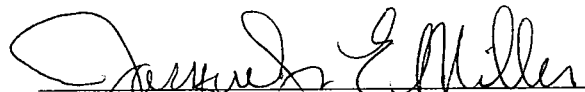
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CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant,
hereby certify that I placed in the United States Mail, a copy of an Appendix and Petition for
Writ of Certiorari, with postage prepaid and the return address clearly shown on said envelope
to:

Office of the Attorney General
Attention: Jessica Kinard, Esq.
P.O. Box 11549
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