STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Oconee County

Honorable Brooks P. Goldsmith, Circuit Court Judge

DAVID LEE COWARD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001358

PETITION FOR WRIT OF CERTIORARI

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in denying Petitioner's request to relieve his appointed PCR counsel where PCR counsel did not adequately confer with Petitioner or investigate Petitioner's PCR allegations?

STATEMENT OF THE CASE

Indictments and Trial

On December 4, 2007, the Oconee County Grand Jury indicted Petitioner David Lee Coward for one count of first-degree burglary and one count of petit larceny. App. 282 – 285.

On January 26-27, 2009, Coward appeared for trial before the Honorable Alexander S. Macaulay and a jury. Coward was represented by Dallas Ball[1] and Richard Warder. The state was represented by assistant solicitor David Wagner. App. 1.

The state alleged that Coward and two other men broke into the home of Debra Miller, the mother of their friend, Jeremy Miller. Though she initially reported nothing missing, Mrs. Miller later reported that an Xbox and several games and two guns were taken from the home. Her dog was also shot and killed. App. 47 – 72. The state's "star" witness was Russell Rogers, who was charged along with Coward. Rogers testified that the burglary was Coward's idea and that Coward shot the dog. App. 73 – 82. The defense's theory of the case was that Coward went to Miller's home to get his Xbox, which he had left there when he was previously residing with the Millers. It was Rogers who decided to take a gun from the house and shoot the dog. App. 150 – 153.

The jury returned verdicts of guilty on both offenses. App. 170. Judge Macaulay sentenced Coward to fifteen years for first-degree burglary and thrifty days of petit larceny. App. 180 – 181.

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[1] Though this Court previously accepted Mr. Ball's indefinite suspension from the practice law in 2001, his license was reinstated on September 7, 2006. In re Ball, 347 S.C. 122, 554 S.E.2d 36 (2001), reinstatement granted, 370 S.C. 376, 635 S.E.2d 308 (2006).

Direct Appeal

On direct appeal, appellate defender Elizabeth Franklin-Best filed the final brief of appellant on March 2, 2010. App. 183. The state filed its brief of respondent on February 5, 2010. App. 193. On December 21, 2011, the Court of Appeals issued an unpublished opinion affirming Coward's conviction. App. 207. Franklin-Best filed a petition for rehearing, which was denied by the Court on January 27, 2012. App. 208; App. 212. Franklin-Best filed a petition for writ of certiorari to the Court of Appeals on February 27, 2012. App. 214. The state filed its return on June 4, 2012. App. 223. On June 20, 2013, this Court denied the petition for writ of certiorari. App. 232. The remittitur was issued on June 25, 2013. App. 275.

Post-Conviction Relief Application and Return

On May 2, 2012, Coward filed his application for post-conviction relief. App. 233. The application included allegations of ineffective assistance of counsel for failing to object to hearsay and denial of equal protection due to disparity in sentencing between co-defendants. App. 235 – 236. The state filed its return on July 30, 2015.[2] App. 241.

Evidentiary Hearing

On February 10, 2016, an evidentiary hearing was held before the Honorable Brooks P. Goldsmith. Coward was represented by Hugh Welborn, and the state was represented by assistant attorney general Patrick Schmeckpeper. App. 246. Coward was the only witness.

Motion to Relieve Counsel

At the beginning of the hearing, Welborn said that Coward wanted to relieve him as counsel and represent himself. App. 248, ll. 15-23. Coward explained that he had originally

[2] Though Coward's PCR application was submitted while the direct appeal was still pending, the Court ruled on the case prior to the state's filing of any motion to dismiss. Thus, the state treated the application as timely filed when it finally made its return in 2015. App. 242, fn. 2.

retained attorney Tommy Thomas for $1,500.00, but that Thomas was demanding $3,000.00 more dollars to continue in the case. Coward said Thomas told him that there were "several issues to raise he could overturn" but he would not tell Coward what those issues were. Coward could not afford to pay the additional money for a private attorney, so Welborn was appointed to his case. App. 248, l. 24 – 249, l. 9.

Coward said that when he talked to Welborn on the phone, Welborn told him that he did not have any "issues." App. 249, ll. 10-11. Welborn told Coward: "We're just going to put you in there, we're going to run it through. We'll take about 15, 20 minutes, we'll get you in and get you out of there." App. 249, ll. 11-14. Coward noted that Welborn was the attorney for all five applicants who were awaiting their hearings that day and that he had said the same thing to all of them. Coward said he did not feel like Welborn even cared. App. 249, ll. 15-21. Coward said that he needed time to study the law. App. 249, l. 22 – 250, l. 1.

Welborn responded that he was prepared to go forward with Coward's case. He said that he was "honest" with Coward and did not want to give him any false hope. Welborn said that he reviewed the allegations contained in the PCR application, but found that the trial court properly addressed the hearsay objections and that the disparity in sentencing was not a ground for relief. App. 251, l. 17 – 252, l. 8.

Judge Goldsmith then said he would see if he could determine exactly what Coward was seeking. The following exchange occurred:

THE COURT:	If I understand you correctly, Mr. Coward, you don't want to go forward today?
MR. COWARD:	No, sir.
THE COURT:	You want a different lawyer?
Mr. COWARD:	Yes, sir.

THE COURT: So you want postponement. Do you want to hire your own lawyer or do you want the Court to appoint you a lawyer?

MR. COWARD: If I had to continue [with] Mr. Welborn, I will do that later on. But I would like at least a continuance at least go and study my options, study the issues that I have. I think I have, what do you do, reapply the application for different issues? Resubmit the PCR application. See, I didn't do that application.

App. 252, ll. 10-24. Welborn offered that if Coward wanted to raise any other allegations, the attorney general's office was generally agreeable to even last minute amendments. However, Welborn said that he did not know what Coward wanted to amend. App. 253, ll. 7-11. Coward responded that he and Welborn had only talked for five minutes on the telephone. App. 253, ll. 12-16. Welborn said: "I read the file and I do speak with them more than five minutes." App. 253, ll. 19-20.

When Judge Goldsmith inquired about whether a pre-trial hearing was conducted on the admissibility of Coward's statement to police, Welborn said "I can't address that, Your Honor, if you're addressing me or him? That wasn't an issue he raised. So I don't remember searching for that in the transcript. It may well be in there. I know the whole case was appealed. The appeal was denied."[3] App. 253, l. 24 – 254, l. 4.

Judge Goldsmith then asked the state its position on Coward's motions to be appointed a new lawyer and to have the case postponed. App. 254, ll. 14-18. AAG Schmeckpeper responded that because the right to counsel in a PCR proceeding is statutory rather than constitutional, there is no right to "counsel of choice, particularly when counsel has been appointed." App. 254, l. 19 – 255, l. 1. Thus, he said that he would "strenuously object to any

[3] A Jackson v. Denno, 378 U.S. 368 (1964), hearing on the admissibility of Coward's statement was conducted at the trial. App. 83 – 107. Additionally, it was the admissibility of Coward's statement that was raised on direct appeal. App. 183 – 232.

new counsel being appointed, particularly where Mr. Welborn's stated he's ready to go, he's reviewed the case, they've talked about it." App. 255, ll. 1-4. Concerning the request for a continuance, AAG Schmeckpeper said he would also object because the case was three years old, giving Coward "plenty of time to speak to his attorney, to amend his application."[4] App. 255, ll. 5-9.

Judge Goldsmith then ruled: "All right, Mr. Coward, I'm going to deny your motion. We'll go forward." App. 255, ll. 11-12.

Testimony

PCR counsel called Coward to the witness stand. He asked Coward to tell the Court what the inadmissible hearsay statements were that he was referring to in his PCR application. App. 257, l. 21 – 258, l. 4. Coward responded: "I haven't seen the application, I really don't even know what the issues are in my favor. That's what I told you, I don't know; but I need time to study. I don't even know what's on it. I don't even know what you got in your hand." App. 258, ll. 5-9. After proving Coward with a copy of the application, the following exchange occurred:

PCR COUNSEL:	Mr. Coward, let me ask you a few questions about that. Now, I didn't prepare your application did I?
MR. COWARD:	No, sir. That's why I asked you to be removed as my lawyer.
PCR COUNSEL:	I understand. You prepared the application or someone in your behalf did; is that correct?
MR. COWARD:	Yes, sir.
PCR COUNSEL:	Is there any reason why you have not reviewed that before we came in here today?

[4] Though Coward filed his PCR application on May 2, 2012, PCR counsel Welborn was not appointed until July 30, 2015, approximately six months prior to the evidentiary hearing on February 10, 2016. See Oconee County Public Index, case no. 2012CP3700404.

MR. COWARD: Because I thought I would have a lawyer that would actually review my case for me.

PCR COUNSEL: Okay. Well, you have in front of you right now, you have that what we call a "return" in front of you. You've got mine, and I've highlighted various parts. And you're telling the Court you do not remember the three hearsay statements that you're objecting to today?

MR. COWARD: Yes, sir.

PCR COUNSEL: You do not remember it?

MR. COWARD: (Nonverbal response.)

PCR COUNSEL: All right. Well, I'm going to try to help you a little bit on this, Mr. Coward.

App. 259, l. 8 – 260, l. 3.

Welborn then proceeded to show Coward three portions of the trial transcript where his trial attorney did object to hearsay, two of which were sustained by the trial judge. App. 260, l. 2 – 262, l. 5. Welborn then asked Coward if he recalled their conversation "on the phone sometime back" when they discussed that Coward's trial attorney successfully objected to the hearsay statements. App. 264, ll. 6-11. Coward responded: "That was last week." App. 264, l. 12. Welborn said: "Yes, sir. That's correct." App. 13-14.

With respect to the sentences of his co-defendants, Coward not only alleged that their sentences were disproportionate but that they obviously lied when they said that they were not receiving anything in exchange for their testimony. App. 264, l. 16 – 265, l. 16. Coward also said that his attorney failed to ask Russell Rogers about his other criminal charges for second-degree burglary and possession of cocaine. App. 265, l. 16 – 266, l. 18; App. 268, ll. 11-24.

The state's cross-examination of Coward consisted only of pointing out where the solicitor asked Russell Rogers about his prior convictions for second-degree burglary and

possession of cocaine. App. 269, l. 7 – 270, l. 6. The state did not call any witnesses. App. 270, ll. 20-22. Judge Goldsmith ruled that Coward's application should be denied and asked the state to prepare a written order. App. 271, l. 19 – 272, l. 15.

Order of Dismissal

On June 13, 2016, Judge Goldsmith filed a written Order of Dismissal. App. 274. The court ruled that Coward's counsel objected to the hearsay statements discussed at the hearing such that he could not be found deficient and that any error in the admission of the hearsay was a direct appeal issue. App. 277 – 278. The court further ruled that Coward failed to prove that his sentence was unlawful or the result of "prejudice, oppression or corrupt motive." App. 278. Regarding the failure to impeach witness Rogers, the court found that the solicitor raised Rogers' prior convictions during his direct examination and that trial counsel explored other areas relevant to Rogers' credibility. App. 279.

ARGUMENT

The PCR court erred in denying Petitioner's request to relieve his appointed PCR counsel where PCR counsel did not adequately confer with Petitioner or investigate Petitioner's PCR allegations.

Coward understandably complained that his PCR attorney's preparation for the case included only a limited review of his PCR application and trial transcript. PCR counsel Welborn agreed that they had only a brief telephone conversation the week prior to the evidentiary hearing and that Welborn told Coward that there was no merit to his PCR allegations. To the extent that Welborn reviewed the trial transcript, it became evident that he reviewed only the portions that he thought were relevant to allegations in Coward's PCR application. Even so, he apparently looked only at the hearsay objections actually made rather than scouring the transcript for the hearsay testimony to which no objection was made, or where trial counsel failed to make a corresponding motion to strike. It was evident from the motions portion of the hearing, and even more so during Coward's testimony, that Welborn's preparation was not that required under even the statutory right to PCR counsel.

Though there is no constitutional right to counsel in PCR proceedings, South Carolina's Uniform Post-Conviction Procedure Act provides for the appointment of counsel for indigent applicants. Aice v. State, 305 S.C. 448, 452 n. 2, 409 S.E.2d 392, 395 n. 2 (1991) (citing Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990 (1987)); S.C. CODE ANN. § 17-27-60 (providing for the payment of court costs and expenses of representation for indigent applicants). Further, Rule 71.1(d), SCRCP, provides:

> If, after the State has filed its 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 a reasonable time to confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.**

(emphasis added). Admittedly, a PCR applicant is not entitled to appointed counsel of choice. Richardson v. State, 377 S.C. 103, 106, 659 S.E.2d 493, 495 (2008). However, he has the right to reject or discharge court-appointed counsel and proceed *pro se* or retain his own counsel. Id. (citing State v. Jones, 270 S.C. 587, 243 S.E.2d 461 (1978)). He may also refuse or dismiss the counsel appointed and have other counsel appointed if he makes a showing of "satisfactory cause." Id.

In Richardson, this Court addressed the recurring problem of PCR applicants seeking repeatedly, and without sufficient cause, to have their appointed counsel relieved. 377 S.C. 103, 105, 659 S.E.2d 493, 494 (2008). In Richardson's case, for example, there were at least nine motions to relieve PCR counsel or to be relieved as PCR counsel made, many of which were granted. Id. This Court recognized that the such delay tactics were an abuse of the judicial process and should not be tolerated. Id. This Court further wrote that "[a] mere disagreement between an applicant and his counsel as to how to proceed with the PCR application, including the allegations to be raised, is not sufficient cause, in itself, to require the PCR judge to replace or to offer to replace court appointed counsel with another attorney." Id. at 106, 659 S.E.2d at 495. Many such disagreements are the result of the applicant's lack of understanding regarding the PCR process and that PCR counsel can properly refuse to pursue meritless of improper allegations. Id.

In State v. Graddick, 345 S.C. 383, 548 S.E.2d 210 (2001), cited in Richardson, this Court found no error in a trial judge's refusal to relieve counsel where the defendant alleged that counsel was not representing his interests, was not fully prepared for this case, and the defendant asserted he did not feel comfortable going to court with counsel as his lawyer. Notably, however, the motion in Graddick was defense counsel's motion to be relieved. 345 S.C. at 385,

548 S.E.2d at 211. Defense counsel withdrew the motion, leaving the trial court nothing to rule upon. Id. Though there was a *pro se* letter from the defendant to the court asking how to fire his attorney, this Court found that Graddick "made only the most conclusory arguments why counsel should have been relieved." Id. Thus, the Court found no abuse of discretion in the trial judge's refusal to appoint new counsel mere days before the start of Graddick's trial for murder. Id. at 211, 548 S.E.2d at 386; see also State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981), overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (finding no abuse of discretion where trial judge denied defendant's motion to relieve counsel based on defendant's allegation that counsel was not up to date on the law).

Coward was not the sort of applicant warned against in Richardson, who moved to relieve counsel merely as a delay tactic. Coward also seemed to accept the fact that the disparity between his sentence and those of his co-defendants was not a ground for relief. However, he was understandably disturbed by the little amount of time that PCR counsel spent conferring with him and the similar response that Welborn gave to all of the applicants that he represented that day – he would get them in and out. See App. 249, ll. 10-21.

Our PCR process is set up such that applicants typically file their PCR applications *pro se*, unless they are able to afford a private attorney. It is only later that counsel is appointed for indigent applicants. See Rule 71.1, SCRCP. At that point, it is incumbent upon appointed counsel to "confer with the applicant" and "insure that all available grounds for relief are included in the application and . . . amend the application if necessary." Rule 71.1(d), SCRCP. That is what makes Welborn's review of the transcript for only the allegations listed in Coward's application so offensive.

Had Welborn properly reviewed Coward's trial transcript, he would have discovered that trial counsel failed to object to hearsay from Russell Rogers on page 77 of the trial transcript. There, Rogers said: "David's mother come out asking him what he was doing. She found the gun, and I guess she called Jeremey Miller's momma and told her." App. 77, ll. 8-14. Counsel would have also found the section of Roger's cross-examination where defense counsel elicited testimony that his own client, Coward, bought beer for his underage friends. App. 81, l. 14 – 82, l. 8. PCR counsel could have also investigated what sentence Rogers ultimately received in light of his unlikely averment on the stand that he was not offered anything in exchange for his testimony. App. 78, l. 20 – 79, l. 1. Additionally, despite making a proper hearsay objection during Scott Arnold's testimony on page 121 of the trial transcript, trial counsel failed to move to strike the testimony. App. 121, ll. 12-25. Moreover, the trial transcript is only one source of fodder for meritorious PCR allegations. There are other allegations that can only be discovered by a thorough discussion with one's client or by considering alternative claims of ineffective assistance of appellate counsel.

While Coward may not have been sophisticated enough to understand everything about the PCR process,[5] he was bright enough to recognize that his PCR attorney was not doing his job. Coward made a sufficient showing that PCR counsel was not fulfilling the most basic requirements for his representation. See Rule 71.1(d), SCRCP. Thus, the PCR judge's denial of Coward's request to relieve PCR counsel was an abuse of discretion.

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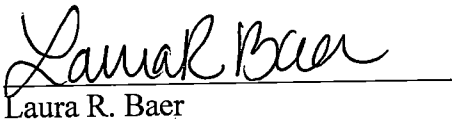
[5] The transcript of the sentencing proceedings reflects that Coward had only a ninth grade education and was working on his GED. App. 178, ll. 16-20.

CONCLUSION

Based on the foregoing, Petitioner David Coward respectfully requests that this Court grant his petition for writ of certiorari and order further briefing on the issue raised herein.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

Honorable Brooks P. Goldsmith, Circuit Court Judge

DAVID LEE COWARD,

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 Lindsey McCallister, 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 David Lee Coward, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 22nd day of February, 2017.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 22nd day of February, 2017.

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