

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County
Court of Common Pleas
The Honorable William H. Seals Jr., Circuit Court Judge

RECEIVED

FEB 24 2017

2015-CP-26-3815
Appellate Case No. 2016-000899

S.C. SUPREME COURT

MARCUS SKEETERS, #199165,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S QUESTION PRESENTED

Did the lower court err in summarily dismissing Petitioner's application for post-conviction relief on the basis that Petitioner failed to make a *prima facie* showing that he is entitled to relief based on newly discovered evidence?

STATEMENT OF THE CASE

Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Horry County. In August 1993, the Applicant 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 Applicant was found guilty on all counts by a jury impaneled before the Honorable Sidney T. Floyd. The Applicant was represented by Orrie E. West, Esquire, Chief Public Defender. Sentencing was conducted on August 10 and 11, 1993, and Applicant 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 Applicant's behalf, and an appeal was perfected. Applicant was represented by M. Ann Pearce, Esquire, Assistant Appellate Defender of the South Carolina Office of Appellate Defense. The South Carolina Supreme Court affirmed Applicant'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, Applicant filed an application for post-conviction relief alleging the necessity of relief on the following grounds:

1. Applicant 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. Applicant 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. Applicant 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. Applicant 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 Applicant 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.

Applicant 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))

Applicant 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. Applicant 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, Applicant 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 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. 305 S.C. 448 (1991). The State filed its return on December 15, 2005, and amended return and motion to dismiss on December 5, 2007.¹ A conditional order of dismissal was filed on December 26, 2007 after being signed by the Honorable J. Michael Baxley on December 19, 2007. Applicant 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.

¹ It appears that both parties to that action were, in the time period between December 2005 and December 2007, under the mistaken belief that the matter had been concluded.

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

Applicant 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. Applicant 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. Applicant 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. Applicant 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.

E. Third and Current Post-Conviction Relief Action (2015-CP-26-3815)

Applicant filed his third application for post-conviction relief claiming newly discovered information. Applicant specifically alleged that he received a letter from South Carolina Department of Probation, Parole, and Pardon Services informing him that he was no longer eligible for parole on the basis that he was a subsequent violent offender. Respondent made a return and motion to dismiss dated July 22, 2015. A conditional order was signed by the Honorable William H. Seals, Jr. on July 27, 2015 and filed on August 11, 2015. A clocked copy of the conditional order was served upon Petitioner’s counsel who in turn filed a return to the

conditional order of dismissal on August 27, 2015. A final order of dismissal signed by Judge
Seals on March 21, 2016 and filed on March 30, 2016. This appeal follows.

STANDARD OF REVIEW

The proper standard for reviewing a summary dismissal of an application for post-conviction relief is viewing the facts in a light most favorable to applicant. Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005).

ARGUMENT

Appellant fails to present sufficient facts or evidence to make a *prima facie* showing that he is entitled to relief on the basis of newly discovered evidence.

Petitioner complains that he was unaware he was ineligible for parole and that had he known he would receive life without parole upon conviction, he would not have exercised his right to a jury trial and would have instead accepted an offer from the State.² Even viewing these facts in a light most favorable to Petitioner, Petitioner fails to demonstrate how this newly discovered evidence warrants a new trial.

Applicant's claim of "newly discovered information"³ fails to make a *prima facie* showing that he is entitled to relief. App. p. 4. Before a Court will hold an evidentiary hearing, the Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Generally, an applicant may raise a newly discovered evidence claim within one year of actual discovery or within one year of when, by the exercise of due diligence, such evidence could have been ascertained. S.C. Code Ann. § 17-27-45(c) (2014). A defendant requesting a new trial based on after-discovered evidence must show that the evidence:

1. Is such that would probably change the result if a new trial was held;
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); Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

² Applicant does not specify what the state's offer was or present any evidence that there was an offer.

³ Applicant's use of the word "information" in place of "evidence" yields the same analysis.

The September 8, 2014 letter from SCDPPPS advising Petitioner that he is ineligible for parole does not meet requirements (1) or (4) set forth in Hayden. Id. Requirement (1) requires that the newly discovered evidence is such that would probably change the result if a new trial was held. Id. Parole ineligibility is irrelevant to Petitioner's trial. It would, in no way, have affected his trial or change the result in a new trial. Sentencing issues are never part of the guilt phase of a trial and cannot be considered by a jury. Parole eligibility was not part of the evidence considered by the jury in this case when they found Applicant guilty. Requirement (4) requires that the newly discovered evidence is material to the issue of guilt or innocence. Id. Parole ineligibility is not relevant to the issue of guilt or innocence. As stated above, the jury did not even consider parole during the guilt phase of Applicant's trial.

In its final decision, the South Carolina Department of Probation, Parole and Pardon Services (SCDPPPS) categorized Petitioner as ineligible for parole based on his three convictions and sentences for violent crimes: murder and assault and battery with intent to kill from 1993 and assault and battery with intent to kill from 1991. Petitioner was notified of this final decision by letter dated September 8, 2014. It is worth noting, that Petitioner was further advised in said letter that he has "the right to appeal the final decision by seeking review by an Administrative Law Judge. Furtick v. South Carolina Department of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2003)." App. p. 44. The letter also explains how to file such an appeal. App. p. 44. There is nothing in the record that indicates Petitioner ever sought review of the final decision of the SCDPPPS.

Respondent further notes that Petitioner should have, upon the exercise of reasonable diligence, been aware of his parole ineligibility prior to the September 8th letter. Petitioner has

had the privilege of representation by numerous competent attorneys⁴ in various state and federal proceedings revolving around these same convictions and sentences. As Petitioner has failed to provide sufficient facts present a *prima facie* showing that he is in possession of newly discovered evidence warranting relief, the lower court's decision to summarily dismiss his application was proper. Therefore, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By: 
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February 24, 2017

⁴ Respondent counts five, to include: Orrie West, *Chief* Public Defender for the 15th Judicial Circuit, M. Ann Pearce, William M. Brunner, Joshua S. Kendrick, William I. Diggs.

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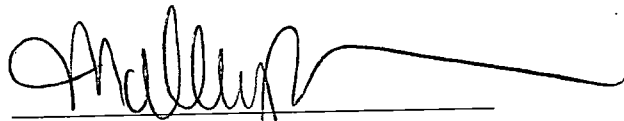
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Mr. Tommy A. Thomas, Esquire
PO Box 88
Irmo, SC 29063

This 24th day of February, 2017



MALLORY MORRIS
Legal Assistant for Respondent