

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Honorable R. Scott Sprouse, Circuit Court Judge

KEVIN C. CASEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001686

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I.

Whether the PCR court erred in failing to ensure that Petitioner's waiver of PCR counsel was knowing and intelligent by informing him of the right to counsel and the dangers of self-representation?

II.

Whether the PCR court erred in denying Petitioner's motion for continuance where the State failed to assist Petitioner with the issuance of subpoenas, as previously instructed by the judge, such that Petitioner's necessary witnesses were not present at the PCR hearing?

STATEMENT OF THE CASE

Indictment and Guilty Plea

On November 22, 2011, the Spartanburg County Grand Jury indicted Petitioner Kevin Casey for two counts of felony driving under the influence (DUI) resulting in death, two counts of reckless homicide, and one count of felony driving under the influence (DUI) resulting in great bodily injury. App. 198.

On February 14, 2012, Casey appeared before the Honorable J. Mark Hayes, III and pled guilty to two counts of felony DUI resulting in death and one count of felony DUI resulting in great bodily injury. Casey was represented by Richard Warder, and the state was represented by Solicitor Barry Barnette. App. 7. The solicitor averred that Casey had a blood alcohol content of .211 and was driving his car at approximately ninety-one miles per hour when he ran into a motorcycle on which Jason Simmons, Steven Mills, and Megan W.¹ were riding. Steven Mills and Megan W. both died, and Jason Simmons was injured. On the date of the incident, Casey was on bond for a third DUI. App. 10, l. 5 – 13, l. 18. Though the solicitor initially said that Simmons was driving, upon inquiry from the judge and further consultation with Simmons, he said that Steven Mills was the driver of the motorcycle. App. 10, ll. 17-18; App. 21, l. 14 – 22, l. 20; but see App. 173 (MAIT report listing Simmons as driver).

Judge Hayes accepted Casey's guilty plea and sentenced him to concurrent terms of twenty-five years for the DUI resulting in death offenses and fifteen years for the DUI resulting in great bodily injury offenses. App. 32 – 33.

¹ Megan W. was seventeen years old on the date of the incident.

Post-Conviction Relief Proceedings

Initial Pleadings

On October 18, 2012, Casey filed an application for post-conviction relief. App. 35. He filed amendments to his application on November 1, 2012 and November 9, 2012. App. 53; App. 56. The state filed its return on January 14, 2014. App. 58.

Motion to Relieve PCR Counsel

On June 9, 2014, Casey filed a motion to relieve his appointed PCR counsel, Leah Moody. Casey's motion indicated that he was requesting "that his current appointed counsel be relieved of this legal matter and [he] be appointed new counsel." App. 63. Casey complained that Moody had failed to contact witnesses for his PCR hearing and not maintained proper communication with him. App. 63 – 64.

On September 17, 2014, Casey appeared before the Honorable Roger L. Couch for an evidentiary hearing, which began with consideration of Casey's motion to relieve PCR counsel. The state was represented by assistant attorney generals Suzanne White and J. Clayton Mitchell. App. 67 – 70. Casey told Judge Couch that he filed a motion to relieve counsel. App. 70, ll. 19-20. Judge Couch explained:

Yes sir. Well, there needs to be -- you need to articulate some reason as to why the court should do that. Generally people benefit from the advice of an attorney. I -- and, of course, if your attorney was appointed, this court would like to know the reason why you think that that attorney should be replaced.

The State doesn't have an obligation just to continue to appoint attorneys for you. So if there is not a rational basis for you to dismiss the attorney, then I would not be of a mind to appoint another attorney for you. So there needs to be some rational basis or reason why you feel that that, the attorney that was appointed cannot handle your case and I haven't heard that yet.

So I'm waiting to hear from you as to why you think the court appointed attorney should be either replaced or removed.

Now, you have every right to represent yourself if you choose to do that. That would be your choice as – to whether you'd like to go forward without an attorney, and I don't know your wishes in that regard. So there's some things you and I need to discuss at this point in time as concerning your representation.

So I'll listen to you.

App. 70, l. 21 – 71, l. 19. Casey told Judge Couch that he filed the motion because he had asked Moody to provide a toxicology report and to contact witnesses, but that she had not done so. He noted that his last conversation with Moody was at his previously continued PCR hearing on April 10, 2014. App. 71, l. 20 – 72, l. 24.

Moody responded that she was appointed to Casey's case in December 2012 and was responsive to his requests. She said they had discussed that the state was unwilling to offer a plea to reckless homicide, such that Casey's options were to go to trial or "follow his [plea] counsel's advice on a negotiated plea." App. 72, l. 25 – 74, l. 12. Moody said that she attempted to contact two potential witnesses, Cassandra Casey and Teresa Pickens. She was not able to speak with Teresa and claimed that Cassandra was not cooperative in providing her address for a subpoena. Even so, Moody said that Cassandra was not present for Casey's plea discussions with his attorney such that Moody was unsure what value her testimony would add. App. 74, l. 12 – 75, l. 7. Moody also noted that Mr. Moore, an additional witness, was present to testify. However, she said that Casey was essentially trying to prove contributory negligence on the part of the motorcycle operator, which she said "doesn't even matter, if you decided to take a plea and you're just mad because you didn't get the plea you wanted." App. 75, ll. 8-14.

Casey told Judge Couch that Cassandra, his daughter, had tried to get in touch with Moody the prior week but never got a response. Though Cassandra knew about the hearing, she needed a subpoena in order to be excused from work. Moody denied having any message from Cassandra. Moody further said that she was in trial the week prior and had her *paralegal* call

Casey to review the questions she would ask him at the PCR hearing but Casey refused to talk to her. App. 75, l. 23 – 77, l. 22. Casey also explained that Moody had not provided him with the toxicology reports for the driver of the motorcycle. Moody responded that she provided Casey with all of the discovery from the solicitor’s office and submitted that the report was not relevant as to whether Casey “himself was driving under the influence and caused the death of two individuals.” Tr. 77, l. 23 – 78, l. 24.

Judge Couch told Casey that he had the right to “dismiss this attorney” but that he had “not yet heard anything that [he] would say was deficient in what she has done.” App. 79, ll. 3-6. Thus, he explained that he was “not of a mind to appoint another attorney for [Casey] if [Moody] is dismissed at this point in time.” App. 79, ll. 6-8. The following exchange occurred:

THE COURT: Now, do you -- how do you wish to proceed?

THE APPLICANT: Proceed as of --?

THE COURT: Right now. Do you want me to dismiss the attorney?

THE APPLICANT: Yes, sir.

THE COURT: And -- but I’m indicating I’m not going to appoint another attorney.

THE APPLICANT: I understand.

THE COURT: Do you understand that?

THE APPLICANT: Yes, sir.

THE COURT: All right. I’ll grant his motion. Ms. Moody, if you’ll prepare an order, I’ll sign it.

MS. MOODY: Thank you, Your Honor.

THE COURT: And indicate in there that the court does not find that your services have been deficient at this point in time. Therefore, the court is not appointing another attorney in the case. I’ll return your letters to you, sir.

(Pause.)

THE COURT: Ms. Moody, if you could, before leaving for -- before Mr. Casey leaves, you may want to go over with him the things he'll need to do to be prepared for his hearing when it is next scheduled. So I'll ask you to advise him as to what he might need to do to subpoena witnesses and things of that nature so that he will be prepared for the hearing.

App. 79, l. 9 – 80, l. 9. The assistant attorney general advised the court that Casey's case would be set for the next term, during the week of November 3, 2014, before the Honorable Keith Kelly. Thus, Judge Couch advised Casey:

So you have until November 3rd to get your case ready. Ms. Moody will advise you as to what you need to do yourself to get the clerk to issue subpoenas for information and/or individuals. You'll need to talk to her about getting those matters served through the sheriff's office. I'm sure she can advise you as to how you can take care of those facts, factors. Good luck to you, sir.

App. 80, l. 10 – 81, l. 2.

On October 23, 2014, Casey filed a letter inquiring into the status of the order relieving counsel. App. 83. On November 14, 2014, despite not having received a written order, Casey filed an objection to Judge Couch's denial of his request to appoint new PCR counsel. App. 84. On November 24, 2014, Judge Couch filed an Order of Continuance/Order Relieving Counsel. The Order stated that "[t]he Applicant requested to relieve counsel and a continuance to secure retained counsel." App. 89. It further included:

Additionally, this Court instructed Applicant that if he chose to relieve his appointed counsel in this matter, the Court **would not** appoint further counsel in the event that Applicant is unable to retain an attorney. Applicant will be required to proceed *prose* in this matter; however, Ms. Moody is instructed to assist Applicant in securing the issuance of subpoenas from the Spartanburg County Clerk of Court's office.

App. 89 (emphasis in original). Casey sent another letter to the court on December 29, 2014, explaining his lack of legal background and inability to subpoena documents and witnesses. App. 91. An Order granting a continuance was filed January 26, 2015. App. 92.

Motion for Continuance

On February 13, 2015, Casey filed an Amendment to his PCR application, followed by a motion for continuance with exhibits on March 16, 2015. App. 95; App. 99. Casey explained that, contrary to the written Order relieving counsel, he never sought to retain private counsel and needed the assistance of a lawyer to go forward with his PCR action. App. 99 – 100. Included in the exhibits to Casey’s motion for continuance was a letter from Moody “explaining” to him the subpoena process. It advised that Casey that he would have to provide the Spartanburg County Sherriff’s Office with a letter detailing who to serve, a check or money order for ten dollars per subpoena, and stamped, self-addressed envelope for return of the signed affidavits of service. App. 112.

On March 26, 2015, Casey appeared *pro se* before the Honorable Roger L. Couch for a hearing on the motion for continuance. The state was represented by assistant attorney general Suzanne White. App. 115. At the beginning of the hearing, Judge Couch asked Casey if it was his desire to proceed without counsel. Casey responded: “No sir, I wanted to ask for counsel.” App. 116, ll. 19-23. After hearing from Casey and AAG White, Judge Couch explained that it was “not unusual” that a judge would not appoint a new attorney if he did not believe that there was “sufficient cause” to relieve the originally appointed attorney. App. 117, l. 3 – 119, l. 12. Judge Couch told Casey “the subpoena power is available to you” and said that he would sign any subpoenas that were presented to him. App. 119, l. 15 – 120, l. 3. Casey told Judge Couch that he wanted to subpoena the victim’s toxicology report from the Greenville Hospital System

and needed subpoenas for Terry Pickens and Donald Moore. Judge Couch instructed Casey to provide the names and addresses to AAG White as soon as possible, after which the subpoenas would be issued and delivered by the Sheriff's Office. App. 120, l. 5 – 123, l. 18.

Evidentiary Hearing

On April 21, 2015, Casey filed another motion for appointment of counsel. App. 125. In a subsequent filing on June 2, 2015, Casey explained that he still needed assistance in obtaining the subpoenas discussed with Judge Couch at the prior hearing. App. 128. On June 12, 2016, an evidentiary hearing was held before the Honorable R. Scott Sprouse. App. 130. At the beginning of the hearing, the court heard Casey's motion for continuance. Casey explained that at his prior hearing before Judge Couch, he understood that he would help with the issuance of subpoenas for his witnesses and toxicology report, but had not received that assistance. App. 133, ll. 12-17. Regarding the order relieving counsel, Casey said: "I still need some help because I don't understand how to do a lot of the stuff *pro se*. I never requested to do that or even state[d] that I was going to retain a counsel because I don't have the funds to do that either." App. 134, ll. 4-11. The following exchange then occurred:

THE COURT: Judge Couch ruled in this order dated November 24, 2014, that there would be no further counsel appointed if she was relieved. So did you get a copy of Judge Couch's order?

THE DEFENDANT: After the fact, yes, sir, but I didn't really understand that I was going to be *pro se* either.

THE COURT: The order states explicitly, "Applicant will be required to proceed *pro se* in this matter." So you were put on notice back in November that you either were going to have to hire your attorney or proceed *pro se*. The court wasn't going to appoint you an attorney. Do you understand that?

THE DEFENDANT: I understand now.

THE COURT: Okay.

App. 134, l. 12 - 135, l. 1.

AAG White agreed that Judge Couch told Casey “that if he needed something subpoenaed, let us know the names and he would make sure he got subpoenas.” App. 135, ll. 14-16. She added that it was her “understanding” that “based on his information that he provided, Judge Couch would make sure that he had the subpoenas and the clerk’s office would issue those for him.” App. 136, ll. 5-8. AAG White said: “I have never received copies of anything. Unfortunately, I’m not sure what Mr. Casey is doing on his own behalf other than expecting the court and our office to continue to write and ask us to subpoena the witnesses.” App. 136, ll. 10-17. Judge Sprouse reviewed the PCR packet and did not see that any subpoenas were issued. App. 137, ll. 2-5. AAG White said that the only subpoena her office issued was for their witness, Dick Warder. App. 137, ll. 6-15.

Casey said that the witnesses he wanted to be present were Teresa Pickens and Donald Moore, and that he also wanted the toxicology report for the alleged victim. App. 137, ll. 16-25. The state said that the only affidavit it had seen was from Teresa Pickens, but noted an objection to its authenticity. App. 138, ll. 1-20. Judge Sprouse ruled that he would deny the continuance but allow Casey to submit the affidavit from Pickens.² He also allowed Casey ten days following the hearing to provide any additional exhibits. App. 138, l. 16 - 139, l. 2.

Casey took the stand and testified regarding several of the allegations raised in his PCR application and subsequent amendments. Casey alleged prosecutorial misconduct for misrepresenting who was driving the motorcycle in the accident by stating that it was not Jason Simmons at the plea hearing. App. 139, l. 22 – 140, l. 21. Casey presented a packet of

² The applicant’s exhibits admitted at the PCR hearing did not include an affidavit from Pickens, and no such affidavit was referenced in the Order of Dismissal. See App. 162 – 182; App. 187 – 197.

documents, which were collectively marked as Applicant's Exhibit 1. Casey pointed to the MAIT report as evidence that the lights on the motorcycle with which he collided were not properly functioning, and to the hospital assessment report as evidence that Jason Simmons "was drinking on the night of this incident." There were also various reports and a statement from witness Donald Moore that listed Simmons as the driver of the motorcycle. App. 140, l. 22 – 143, l. 12; see App. 162; App. 164; App. 173 – 185. Casey said that had he known that Simmons was the actual driver and had consumed alcohol on the night of the incident, he would not have pled guilty but instead insisted on going to trial. App. 143, ll. 13-18. Casey further argued that plea counsel was ineffective in failing to object when the state failed to recommend a ten-year sentence at the plea hearing. Casey said that he signed the sentencing sheets prior to the plea hearing with the understanding that the sentence would be ten years. Casey said that he had an affidavit from his aunt, who discussed the ten-year offer with plea counsel prior to the plea hearing. App. 143, l. 21 – 144, l. 22; App. 166 – 169. Lastly, Casey argued that plea counsel was ineffective in failing to interview Donald Moore regarding Simmons' statements at the scene and the alcohol on Simmon's breath. App. 144, l. 23 – 145, l. 8.

On cross-examination, Casey explained that he believed that he was only partially at fault in the accident. App. 146, ll. 7-13. Casey agreed that the plea judge went over the maximum sentences and that no one mentioned a negotiated ten-year plea. However, Casey said that he agreed to plead guilty because he still thought that only the ten years would be imposed. App. 147, l. 12 – 148, l. 15. Casey said that he did not say anything at the plea hearing when the solicitor said that Simmons was only a passenger because he did not understand its significance at that time and was under the impression he would receive the ten-year sentence. App. 148, l. 20 – 149, l. 5.

Plea counsel, Richard Warder, testified for the state. Warder was retained by Casey. App. 150, ll. 7-11. Warder said that there was never a ten-year plea offer and that he did not believe that the facts of the case would have called for such a low offer. App. 151, l. 4 – 152, l. 24. Warder claimed that he discussed whether the motorcycle driver’s consumption of alcohol or non-malfunctioning lights would have provided a defense, but that their “ultimate conclusion was that was not going to carry the day.” App. 151, l. 25 – 152, l. 8. Warder’s advice to plead guilty was based upon what he considered to be the “terrible set of facts” and sentencing mitigation related to Casey’s strong work history and family life. App. 152, l. 9 – 153, l. 3. Warder said that it was unclear from the reports who drove the motorcycle, but that such information would not have affected any defenses that could be raised. He further averred that the blood alcohol content of the deceased and injured persons was not relevant. App. 153, ll. 4-13; App.155, l. 18 – 158, l. 9.

Judge Sprouse took the matter under advisement and instructed both parties that they had ten days to supplement the record. App. 159, l. 20 – 160, l. 2.

Order of Dismissal

On June 22, 2015, Judge Sprouse filed an Order of Dismissal, denying Casey’s application for post-conviction relief. App. 186.

On June 22, 2016, Casey filed an inquiry with the court because he had not received any decision in his case. App. 197.

This appeal follows.

ARGUMENT

I. The PCR court erred in failing to ensure that Petitioner's waiver of PCR counsel was knowing and intelligent by informing him of the right to counsel and the dangers of self-representation.

Casey's motion to relieve PCR counsel explicitly requested the appointment of a new attorney. It mentioned nothing regarding retention of a private attorney or a desire to proceed *pro se*. App. 63. While the PCR court was not under any obligation to grant Casey's request, it should not have partially granted the motion – relieving Moody and leaving Casey to proceed *pro se* – without ensuring that Casey's waiver of PCR counsel was knowing and intelligent. See Richardson v. State, 377 S.C. 103, 659 S.E.2d 493 (2008); Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992).

While there is no constitutional obligation to appoint counsel in a PCR matter, in South Carolina, if a PCR application presents questions of law or fact requiring a hearing, and the applicant is indigent, state law provides that counsel must be appointed or a knowing, intelligent waiver of the right to counsel must be obtained. S.C. Code Ann. § 17-27-60 (2003); Rule 71.1(d), SCRPC; Whitehead, *supra*; see also Gary v. State, 347 S.C. 627, 557 S.E.2d 662 (2001) (Counsel should be appointed when the State moves for dismissal on the ground the application was not timely filed where the applicant raises an issue of material fact regarding the applicability of the one-year statute of limitation.). While an applicant *may* have the right to reject or discharge court-appointed counsel and proceed *pro se* or retain his own counsel, he does not have the right, without a showing of satisfactory cause to refuse or dismiss the counsel appointed and have other counsel appointed. State v. Jones, 270 S.C. 587, 243 S.E.2d 461 (1978).

In Richardson v. State, 377 S.C. 103, 106, 659 S.E.2d 493, 495 (2008), this Court cautioned that PCR counsel “should not be relieved, and the process delayed, because an applicant is dissatisfied with counsel’s legitimate refusal to pursue allegations that are meritless and/or not proper in PCR.” This Court was also concerned with the use of the attorney grievance process and motions to relieve PCR counsel as a delay tactic by applicants. 377 S.C. at 107, 659 S.E.2d at 495.

Even so, whether the right to counsel is bestowed by constitution or statute, its waiver must be knowing and intelligent. In Whitehead v. State, 310 S.C. 532, 535, 426 S.E.2d 315, 316 (1992), this Court explained that Rule 71.1(d), SCRCP, mandates the appointment of counsel for indigent PCR applicants whenever a PCR hearing is held to determine questions of law or fact. Thus, this Court held that “when a PCR application is not dismissed *before* a hearing is held, the PCR judge **must appoint counsel or obtain a knowing and intelligent waiver of that right by the applicant.**” 310 S.C. at 535, 426 S.E.2d at 316 (additional emphasis added); see also Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999) (remanding case for determination of whether waiver of right to appellate counsel following first PCR hearing was knowing and intelligent).

“To establish a valid waiver of the right to counsel, **the PCR applicant must be made aware of the right to counsel and the dangers of self-representation.**” Whitehead, 310 S.C. at 535, 426 S.E.2d at 316-17 (citing Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (1990)) (emphasis added). Prince involved the waiver of counsel at a guilty plea hearing, and thus discussed the requirements for a valid waiver of counsel under Faretta v. California, 422 U.S. 806 (1975). 301 S.C. at 423-24, 392 S.E.2d at 463. “In the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the appellate Court] will look to the record to determine whether petitioner had

sufficient background or was apprised of his rights by some other source. Id. at 424, 392 S.E.2d at 463.

In the present case, Casey was never made aware of the “right to counsel and the dangers of self-representation” as required under Whitehead. Rather, Casey was told that “[g]enerally people benefit from the advice of an attorney.” App. 70, ll. 23-24. Judge Couch further told Casey:

Now, you have every right to represent yourself if you choose to do that. That would be your choice as – to whether you’d like to go forward without an attorney, and I don’t know your wishes in that regard. So there’s some things you and I need to discuss at this point in time as concerning your representation.

App. 71, ll. 13-18. After hearing from both Casey and Moody, Judge Couch told Casey that while he had the right to “dismiss this attorney,” he had “not yet heard anything that [he] would say was deficient in what she has done.” App. 79, ll. 3-6. Thus, Judge Couch explained that he was “not of a mind to appoint another attorney for [Casey] if [Moody] is dismissed at this point in time.” App. 79, ll. 6-8. He then asked Casey how he wanted to proceed – whether he wanted him to dismiss the attorney even though he would not appoint another one. Casey said “yes” and “I understand.” App. 79, l. 9 – 80, l. 9. However, as Casey expressed in many subsequent filings with the Court and at the subsequent hearings held in his case, he did not understand the dangers of self-representation and greatly desired the assistance of an attorney for his PCR hearing. App. 84; App. 91; App. 95; App. 99; App. 116, ll. 19-23; App. 134, l. 4 – 135, l. 1. Though Casey’s performance at his PCR hearing is not relevant to whether his waiver of counsel was valid, it is also notable that Casey did not secure the presence of any witnesses at his PCR hearing and the affidavit of Teresa Pickens was not made a part of the record.

In short, Casey did not make a knowing and intelligent waiver of PCR counsel. He is accordingly entitled to a new PCR hearing and the assistance of PCR counsel.

II. The PCR court erred in denying Petitioner’s motion for continuance where the State failed to assist Petitioner with the issuance of subpoenas, as previously instructed by the judge, such that Petitioner’s necessary witnesses were not present at the PCR hearing.

Casey was assured at both the hearing relieving PCR counsel and at the hearing on his first motion for continuance that he would have the ability to subpoena documents and witnesses despite his *pro se* status. App. 80, l. 3 – 81, l. 1; App. 119, l. 15 – 123, l. 10. Judge Couch instructed Casey to provide the names and addresses of the witnesses he needed to AAG White and information on the documents he was requesting. App. 123, ll. 7-9. However, when the evidentiary hearing was called before Judge Sprouse, AAG White lamented Casey’s requests that she issue subpoenas for his witnesses and averred that such requests should have been made to Judge Couch and the Clerk’s Office. App. 135, l. 8 – 137, l. 15. Notably, Donald Moore was subpoenaed and present at the hearing where Moody was relieved as counsel, such that AAG White’s assertion that the witnesses may not have wanted to attend the hearing was dubious. App. 73, ll. 12-18; App. 136, l. 19 – 137, l. 1. Further, the purpose of issuing a subpoena is to secure the presence of one’s necessary witnesses, regardless of their desire to attend.

In Ungar v. Sarafitr, the United States Supreme Court noted that “it is not every denial of a request for more time that violates due process even if the party fails to offer evidence” 376 U.S. 575, 589, 84 S.Ct. 841, 849 (1964). However, the Court wrote: “Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.” Id. at 589, 84 S.Ct. at 849-50.

In State v. Tanner, 299 S.C. 459, 385 S.E.2d 832 (1989), this Court ruled that the trial judge abused his discretion in denying the defense's motion for continuance to conduct an independent examination, or at least await SLED analysis, of blood and skin samples that were not provided to the defense until ten minutes prior to trial. This Court distinguished its prior decision in State v. Squires, 248 S.C. 239, 244, 149 S.E.2d 601, 603 (1966), where the denial of a continuance was affirmed because "[t]here [was] no showing that any other evidence on behalf of the appellant could have been produced, or that any other points in their behalf could have been raised had more time been granted for the purpose of preparing the case for trial." Tanner, 299 S.C. at 462–63, 385 S.E.2d at 834. It was further noted that "[n]o real harm would have befallen the State from [a] continuance." Id. In fact, the Court noted that once the analysis was conducted, it may be that the samples will be supportive of the State's case. Id.

Notably, two of Casey's allegations required the presence of witnesses at the PCR hearing to substantiate his claims. Regarding the ten-year plea offer, the evidence presented at the hearing consisted of Casey's testimony that he had accepted a ten-year offer and plea counsel's testimony that no such offer was made. App. 143, l. 21 – 144, l. 22; App. 151, l. 4 – 152, l. 24; App. 166 – 169. In the Order of Dismissal, the PCR court ruled that the applicant "presented no credible evidence a ten year plea offer existed." App. 192. However, Casey averred that his aunt, Teresa Pickens, had a discussion with plea counsel Warder regarding the ten-year offer. This was one of the witnesses who Casey asked to be subpoenaed for the hearing. App. 120, ll. 12-16. Because the Attorney General's Office failed to subpoena Pickens, despite having been instructed to assist Casey by Judge Couch, Ms. Pickens was not present to testify at the hearing in support of Casey's allegation.

Additionally, Casey alleged that PCR counsel was ineffective in failing to interview Donald Moore. App. 144, l. 23 – 145, l. 8. Again, this was one of the witnesses who Casey requested to have subpoenaed for the PCR hearing. App. 120, l. 17. In the Order of Dismissal, the PCR court ruled that Casey’s argument that plea counsel failed to investigate the victim and witnesses was “meritless.” App.194. The Court found that Casey failed to present testimony at the evidentiary hearing to support his allegations, citing several cases that held: “A PCR applicant cannot show that he was prejudiced by counsel’s failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence.” App. 194; Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (citing Glover v. State, 318 S.C. 496,498,458 S.E.2d 538,540 (1995)). By failing to subpoena Moore, it was impossible for Casey to substantiate his claim related to plea counsel’s failure to interview him.

While Casey had received prior continuances in his case, they all centered around the same problem with subpoenaing witnesses. Despite Judge Couch’s instructions to assist Casey, AAG White subpoenaed only her own witness for the hearing. Thus, any prejudice to the state from an additional continuance was the product of its own inaction. Casey bore the burden of proof at the PCR hearing, and his witnesses were necessary to support his claims. Affidavits from the witnesses, even if they had been provided to the PCR court, would not have substituted for their live testimony. Thus, the PCR court erred in denying Casey’s motion for continuance. Casey is accordingly entitled to a new PCR hearing, at which the court can consider the testimony of his witnesses.

CONCLUSION

Based on the foregoing, Petitioner Kevin Casey respectfully requests that this Court grant the petition for writ of certiorari and allow further briefing on the issues raised herein.

A handwritten signature in black ink, appearing to read "Laura R. Baer", written over a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of May, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable R. Scott Sprouse, Circuit Court Judge

KEVIN C. CASEY,

PETITIONER

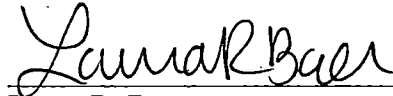
V.

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 Valerie Govanoli, 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 Kevin C. Casey, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 17th day of May, 2017.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of May, 2017.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027 .