

STATE OF SOUTH CAROLINA
In the Court Of Appeals

APPEAL FROM UNION COUNTY
D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2017-000188

RECEIVED
MAY 31 2017
SC Court of Appeals

THE STATE,

Respondent,

v.

ELSON MCKANIC, JR.,

Appellant.

RETURN TO MOTION FOR APPOINTMENT OF COUNSEL

Respondent (the State), by and through undersigned counsel and making Return to the Motion for Appointment of Counsel, would respectfully show unto this Court:

Procedural History

Petitioner was indicted at the September 1975, term of the Union County Grand Jury for Armed Robbery (1975-GS-44-0177). Jack S. Flynn, Esquire, represented him on the charges. On September 18, 1975, Petitioner proceeded to trial and was found guilty as indicted. The Honorable Clarence E. Singletary, sentenced him to confinement for a period of twenty-five (25) years. A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. The South Carolina Supreme Court affirmed Petitioner's conviction and sentence. State v. McKanic, Op. No. 76-21 (S.C. Sup. Ct. filed March 16, 1976).

1978 PCR Application

Petitioner subsequently filed an application for post-conviction relief on January 2, 1978. The State filed its Return on March 6, 1979, at which Petitioner was present and represented by Nora B. Lewis, Esquire. The Honorable Robert W. Hayes denied and dismissed Petitioner's application by written Order on June 4, 1979. Petitioner did not appeal the denial of this PCR application.

1981 PCR Application

Petitioner subsequently filed a second application for PCR on May 12, 1981. The State filed its Return on March 3, 1982. An evidentiary hearing was convened on March 15, 1982, at which Petitioner was present and represented again by Nora B. Lewis, Esquire. The Honorable Stuart H. Hall denied and dismissed Petitioner's application by written Order on June 3, 1982. The Petitioner did not appeal the denial of his PCR application.

1991-GS-44-0557, 0558

Petitioner was indicted at the August 1991, term of the Union County Grand Jury for Armed Robbery (1991 -GS-44-0557), Assault and Battery With Intent To Kill, and Possession of a Firearm or Knife During the Commission of a Violent Crime (1991-GS-44-0558). Joseph Workman, Esquire, represented him on the charges. On September 26, 1991, Petitioner proceed to trial and was found guilty of Armed Robbery, Assault and Battery of a High and Aggravated Nature, and Possession of a Firearm or Knife During the Commission of a Violent Crime. The Honorable H. Dean Hall sentenced him to confinement for a period of life without parole for Armed Robbery and ten years for Assault and Battery of a High and Aggravated Nature. Petitioner did not appeal his conviction and sentence

1993-CP-44-0030 PCR Application

Petitioner filed another PCR challenging his convictions on February 8, 1993. Subsequently Petitioner amended his application twice—first on October 13, 1994 and second on April 27, 1995. The State filed its Return and Motion to Dismiss on March 3, 1995. An evidentiary hearing was convened on March 12, 1996, at which the Petitioner was present and represented by Robert Guess. The Honorable Frank P. McGowan dismissed Petitioner's application by written Order on March 14, 1996.

A timely Notice of Appeal was filed from the denial of the PCR. A Petition for Writ of Certiorari was filed on the Petitioner's behalf pursuant to Johnson v. State, 294 S.C. 310, 264 S.E.2d 201 (1988). Petitioner filed a letter in lieu of a formal response to the petition on or about October 22, 1996. The South Carolina Supreme Court denied the Petition for Writ of Certiorari on May 27, 1997. The Remittitur was sent on June 12, 1997.

2000-CP-44-0334 PCR Application

Petitioner filed another PCR challenging his convictions on December 13, 2000. The State filed its Return and Motion to Dismiss on July 16, 2001, and its Amended Return and Motion to Dismiss on March 12, 2002. An evidentiary hearing was convened on April 1, 2002, at which the Petitioner was present and represented again by Gary T. Frost, Esquire. The Honorable Lee S. Alford dismissed Petitioner's application for failure to file within the statute of limitations, successiveness, and laches, by written Order on August 26, 2002.

A timely Notice of Appeal was filed from the denial of the PCR. A Petition for Writ of Certiorari was filed on the Petitioner's behalf pursuant to Johnson v. State, 294 S.C. 310, 264 S.E.2d 201 (1988). Petitioner filed a response to the petition on or about August 7, 2003. The South Carolina Supreme Court denied the Johnson petition and requested a formal Petition on

February 11 , 2004. The Petition for Writ of Certiorari was denied on November 4, 2004. The Remittitur was sent on November 23, 2004.

9:04-1835-20BG Federal Habeas

Petitioner filed a Federal Habeas Corpus in the Federal District Court for the District of South Carolina on June 16, 2004. The Magistrate's Report and Recommendation issued on November 23, 2004, recommending that the action be dismissed. On January 25, 2005, the Honorable Henry M. Herlong, Jr. adopted the Report and Recommendation and granted the State's Motion for Summary Judgment, denying the Petitioner's Habeas Corpus claim.

2005-CP-44-0293 State Habeas

On November 29, 2005 Petitioner filed a Writ of Habeas Corpus in Circuit Court challenging his convictions. The State filed its Return and Motion to Dismiss on July 6, 2006. The Petitioner submitted an Objection to the Order of Dismissal on or about July 12, 2006. The Honorable John C. Hayes, III, dismissed Petitioner's Writ by written Order on July 12, 2006.

A timely Notice of Appeal was filed from the denial of the Writ. The Appeal was dismissed on February 8, 2007, for failure of Petitioner to serve the Record on Appeal to opposing counsel and file an original Certificate of Service. The Remittitur was sent on February 28, 2007.

06-465, 07-144, and 07-5393

On July 7, 2006, Petitioner filed a Motion For Order Authorizing District Court to Consider Second or Successive Application for Relief in the United States Court of Appeals for the Fourth Circuit (06-465). On July 26, 2006, the Court denied the Motion.

On or about March 26, 2007, Petitioner filed another Motion For Order Authorizing District Court to Consider Second or Successive Application for Relief in the United States

Court of Appeals for the Fourth Circuit (07-144). On April 16, 2007, the Court denied the Motion.

Petitioner then filed a Petition for Extraordinary Writ of Habeas Corpus in the United States Supreme Court on or about July 12, 2007 (07-5393). The Supreme Court denied the petition on October 1, 2007.

2008-CP-44-0081 PCR Application

Petitioner filed another PCR challenging his convictions on March 13, 2008. The State filed its Return and Motion to Dismiss on or about October 9, 2008. On November 7, 2008, the Honorable John C. Hayes, III, issued an order dismissing the PCR application with prejudice and prohibiting Petitioner from filing any legal actions related to his current imprisonment without submitting the filing fees and a notarized affidavit for the Chief Administrative Judge to make a finding on whether the allegations are non-frivolous and proper for the Court before they are filed. The Order instructs the Clerk of Court to return all documents that do not comply. Petitioner filed a notice of appeal, which was ultimately denied.

2013-CP-44-0077 PCR Application

Petitioner filed another PCR Application on March 11, 2013. On August 14, 2013, the Honorable John C. Hayes, III, issued an order dismissing the PCR action due to Petitioner's failure to follow the terms as set forth in the Order filed on November 17, 2008 which restricted future filings.

Writ of Mandamus

On or about December 21, 2016, Petitioner filed a Writ of Mandamus, arguing that the Court should entertain the merits of his writ to correct the miscarriage of justice regarding his unlawful life sentence for three armed robberies.

On January 4, 2017, the Honorable John C. Hayes, III, issued an order dismissing the Petition with prejudice, finding that the petition was meritless on its face and because the petition was subject to the Order restricting future filings dated November 7, 2008.

Petitioner now appeals the ruling of the Judge Hayes issued January 4, 2017.


As to Petitioner's motion for appointment of counsel, Respondent would argue that Petitioner is not entitled to counsel on an appeal from a writ of mandamus. Additionally, it should be clear that the appeal is meritless because Judge Hayes followed the procedure outlined in an order that prohibited Petitioner from filing any more actions unless certain conditions were met. Judge Hayes dismissed the Writ of Mandamus as Petitioner was not entitled to future filings.

WHEREFORE, having made Return, the State opposes Petitioner's motion for appointment of counsel as Petitioner is not entitled to such appointment.

Respectfully submitted,

ALAN WILSON
Attorney General

JUSTIN HUNTER
Assistant Attorney General

BY: 
Justin James Hunter
S.C. Bar No: 101254

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 31, 2017

STATE OF SOUTH CAROLINA
In the Court Of Appeals

APPEAL FROM UNION COUNTY
D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2017-000188

ELSON MCKANIC,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Motion for Appointment of Counsel, has been served upon Elson McKanic, #182215 by mailing one (1) copy in the United States mail, postage prepaid:


Elson McKanic, #182215
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

RECEIVED

MAY 31 2017

SC Court of Appeals

This 31st day of May, 2017



Jennifer Jennison
PCR Legal Assistant



ALAN WILSON
ATTORNEY GENERAL

May 31, 2017

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Elson McKanic #182215 v. State of South Carolina
Appellate Case No. 2017-000188
Lower Court Case No. 2008-CP-44-0081

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Return to Motion for Appointment of Counsel. By copy of this letter we are serving Elson McKanic today.

Sincerely,

Justin J. Hunter
Assistant Attorney General
SC Bar No. 101254

JJH/jaj
Enclosures

cc: Elson McKanic, #182215

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