STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Berkeley County

Honorable Jean H. Toal, Circuit Court Judge

SAMUEL BROWN, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002537

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

INDEX

ISSUE PRESENTED

Whether the PCR court erred in granting the state's motion for summary judgment and dismissing Petitioner's application for post-conviction relief where (a) the PCR court erroneously ruled that an applicant who is in custody at the time of the filing of his PCR application can no longer pursue PCR if he completes service of his sentence prior to the PCR hearing; and (b) the PCR court erroneously ruled that Petitioner was required to allege that "the results of his prior conviction still persist" in his original PCR application, filed while he was still in custody on the contested conviction, or in an amended application?

STATEMENT OF THE CASE

On September 25, 2013, the Berkeley County Grand Jury returned an indictment against Petitioner Samuel Brown, Jr. for one count of possession with the intent to distribute ("PWID") marijuana. App. 41.

On May 20, 2014, Brown appeared before the Honorable Kristi L. Harrington and pled guilty to the indicted offense. Brown was represented by Chad Shelton, and the State was represented by assistant solicitor Michael Patterson. App. 1. Judge Harrington imposed the negotiated sentence of three years, run concurrent to a ten year sentence that Brown was serving for a separate offense that he was convicted of after a trial.[1] App. 4; App. 10.

On November 20, 2014, Brown filed an application for post-conviction relief, which included an allegation of ineffective assistance of plea counsel. App. 11 – 13. The State filed its Return on August 31, 2015. App. 19. On August 22, 2016, the State filed a copy of the PCR hearing roster, which listed Brown's case as set for a hearing at 9:30 a.m. on September 16, 2016, with witness Chad D. Shelton. App. 25.

On September 16, 2016, Brown appeared before the Honorable Jean H. Toal, prepared for an evidentiary hearing on his PCR allegations. App. 27. Brown was represented by Rodney Davis, and the State was represented by assistant attorney general Rutledge Johnson and Charleston School of Law student Christopher Harrison. App. 27 – 28; *see* Rule 401, SCACR.

At the outset of the hearing, the State made a motion for summary judgment pursuant to Rule 56, SCRCP, arguing that the case was moot because Brown had completed service of his three year sentence. App. 29, ll. 6-10. Following argument from counsel, Former Chief Justice

---

[1] Brown is currently contesting his conviction and sentence for trafficking cocaine more than ten grams but less than twenty-eight grams in appellate case no. 2016-001477.

Toal granted the state's motion and dismissed the application. App. 32, l. 17 – 33, l. 4. A form order granting summary judgment was filed September 19, 2016, and a formal Order of Dismissal was filed on November 15, 2016. App. 34; App. 35.

This appeal follows.

STATEMENT OF FACTS

The State's motion for summary judgment was premised upon the PCR issues being moot because Brown had "maxed out" his three year sentence on the PWID marijuana offense. App. 29, ll. 6-10. In response, PCR counsel cited both the Uniform Post-Conviction Procedure Act ("PCR Act") and *McDuffie v. State*, 276 S.C. 229, 277 S.E.2d 595 (1981). Counsel maintained that the PCR Act requires only that the applicant have been convicted and sentenced for a crime and alleges a cognizable claim for relief. App. 29, ll. 12-22; S.C. Code Ann. § 17-27-20. Counsel further argued that the negative effects of Brown's conviction persist, including the potential of future charging or sentencing enhancements, future exclusion from government housing, and future use against him in a custody action. Thus, he requested that the PCR court proceed with a hearing on the merits. App. 29, l. 23 – 31, l. 8.

The State responded that the marijuana conviction did not serve to enhance the trafficking cocaine charge that Brown was currently serving and argued that other potential collateral consequences from the marijuana conviction were not ripe. App. 31, ll. 9-24. In reply, PCR counsel argued that *Jackson v. State*, 331 S.C. 486, 489 S.E.2d 915 (1997), listed a variety of collateral consequences as potential evidence that "the results of the conviction still persist." App. 32, ll. 1-15; *see Jackson*, 331 S.C. at 491 n. 1, 489 S.E.2d at 917 n. 1 ("Petitioner alleged, as a result of his conviction, he has suffered the following consequences: (1) he was denied Section 8 housing; (2) this conviction may be used against him in a custody action; (3) this conviction can be used to enhance the sentence of a future drug conviction; (4) unbeknownst to petitioner, his license was suspended as a result of the conviction; and (5) thereafter, petitioner was charged with driving under suspension (DUS).").

The PCR court granted the motion for summary judgment and dismissed the application, providing the following reasoning:

> [I]t's the Court's view that future consequences will not prevent a dismissal of a matter in this instance where the sentence has been fully served because a post-conviction relief is not a direct appeal, it's a collateral consequences attack on the constitutionality of the representation, and it finds its antecedents in the old habeas corpus.
>
> The State is not holding him on this charge anymore, and therefore I don't believe PCR can be used to contest this matter.

App. 32, l. 16 – 33, l. 4. In the subsequent written order of dismissal, the PCR court noted that Brown's sentence for the marijuana charge was "satisfied in full not later than June 26, 2016." App. 37. After quoting portions of Rule 56(b) and (c), SCRCP, the court wrote: "In this case, Applicant claims he is suffering the collateral consequences of his conviction despite having already served the full term." App. 37. The court then conducted the following analysis:

> First, this claim was not specifically alleged in the Applicant's PCR application. See Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965) ("In an application for post-conviction relief, it is incumbent upon the applicant to make at least a prima facie showing which would entitle him to relief"). Second, this Court grants the State's motion for summary judgment because the Applicant failed to demonstrate any prejudicial effects resulting from the collateral consequences of his conviction. See Jackson v. State, 331 S.C. 486,489 S.E.2d 915 (1997) (Where petitioner was entitled to evidentiary hearing *"because petitioner alleged in his application* and during the hearing he was suffering continuing consequences of his alleged invalid conviction") (emphasis added). Applicant did not make these allegations in his original application for post conviction relief filed on November 20, 2014, and did not file any subsequent amendments to his original application. The evidence before this Court clearly shows there is no genuine issue as to any material fact and the State, as the moving party is entitled to judgment as a matter of law.

App. 37. Thus, the PCR court dismissed Brown's PCR application with prejudice. App. 38.

ARGUMENT

The PCR court erred in granting the state's motion for summary judgment and dismissing Petitioner's application for post-conviction relief where (a) the PCR court erroneously ruled that an applicant who is in custody at the time of the filing of his PCR application can no longer pursue PCR if he completes service of his sentence prior to the PCR hearing; and (b) the PCR court erroneously ruled that Petitioner was required to allege that "the results of his prior conviction still persist" in his original PCR application, filed while he was still in custody on the contested conviction, or in an amended application.

Introduction

As will be discussed more fully *infra*, the PCR court's grant of the State's motion for summary judgment was premised upon multiple errors of law. In determining that a PCR applicant was required to be "in custody" at the time of the PCR hearing, the PCR court improperly analogized state habeas proceedings, which do become moot upon a petitioner's completion of his sentence. *See* App. 32, l. 16 – 33, l. 4; *Gibson v. State*, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (1998) ("The inquiry on habeas corpus is limited to the legality of the prisoner's present detention. The only remedy that can be granted is release from custody."). Such an analogy to post-conviction proceedings was explicitly rejected in *Jackson v. State*, 331 S.C. 486, 489, 489 S.E.2d 915, 916 (1997). Rather, PCR proceedings are more akin to federal habeas proceedings, which are not rendered nonjusticiable by the petitioner's subsequent release. *See Jones v. State*, 322 S.C. 101, 102, 470 S.E.2d 110 (1996) (citing *Carafas v. LaVallee,* 391 U.S. 234 (1968); *Maleng v. Cook,* 490 U.S. 488, 491 (1989)).

The PCR court further failed to appreciate that the requirement that a PCR applicant be "in custody or the results of his prior conviction still persist" relates solely to the applicant's standing to file a PCR application. *Jones v. State*, 322 S.C. 101, 102, 470 S.E.2d 110 (1996) ("A petitioner has standing to petition for PCR if he is in custody or the results of his prior conviction still persist."). Here, Petitioner Brown filed his PCR application alleging ineffective assistance

of plea counsel six months after his guilty plea, while he was still "in custody" serving the three year sentence for PWID marijuana. App. 11. Because Brown was in custody when his application was filed, he was not required to also preemptively allege that the results of his conviction would persist in anticipation of the prospect that the PCR process would go beyond completion of his sentence. Further, where the State's claim of mootness was made in an oral motion at the PCR hearing,[2] Brown was entitled to respond orally. Assuming *arguendo* that it was then incumbent upon Brown to prove that he was prejudiced by the persistent results of his conviction, the PCR court was required to hold an evidentiary hearing to determine prejudice. The grant of summary judgment was improper.

Standard of Review

This Court gives deference to the PCR judge's findings of fact, and "will uphold the findings of the PCR court when there is any evidence of probative value to support them." *Miller v. State,* 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008) (citing *Suber v. State,* 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007)). However, this Court reviews questions of law *de novo,* and "'will reverse the decision of the PCR court when it is controlled by an error of law.'" *Goins v. State,* 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (quoting *Lomax v. State,* 379 S.C. 93, 101, 665 S.E.2d 164, 167-68 (2008)).

---

[2] Rule 56(c), SCRCP, provides that a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." However, PCR counsel did not object to the oral form of the State's motion. Even so, while characterized and ruled upon as a motion for summary judgment, the completion of Brown's sentence did not affect the existence of a dispute of material fact – whether plea counsel rendered ineffective assistance of counsel. Rule 56(c), SCRCP; *see also* App. 20 – 21. Thus, the state's motion was more akin to a motion to dismiss based upon an allegation that the controversy had become moot.

Discussion

In *McDuffie v. State*, 276 S.C. 229, 277 S.E.2d 595 (1981), this Court reversed the lower court's grant of summary judgment and dismissal of the PCR application for lack of standing. McDuffie was convicted of assault and battery of a high and aggravated nature in South Carolina in 1966. *McDuffie*, 276 S.C. at 229, 277 S.E.2d at 595. McDuffie had served his South Carolina sentence when he filed a PCR application alleging that the 1966 conviction was adversely affecting his current sentence in North Carolina, by enhancing his sentence, reducing his prison privileges, and reducing his possibility of parole. *Id.* This Court quoted *United States v. Morgan*, 346 U.S. 502, 512-513 (1954), which held: "Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that this conviction was invalid." *McDuffie*, 276 S.C. at 230, 277 S.E.2d at 596. The *McDuffie* Court further relied upon *United States v. Gernie*, 228 F.Supp. 329, 332 (D.C.S.D.N.Y.1964), which held: "[T]he case is not considered moot merely because sentence has been completed, and the court has power to vacate and set aside an illegal conviction and sentence if the proceedings are well-grounded." *Id.* Thus, *McDuffie* held: "[W]here an applicant for post conviction relief alleges in his application that the results of his prior conviction still persist, even though the sentence has been fully served, he is entitled to an evidentiary hearing to determine whether or not he has been prejudiced." *Id.* at 231, 277 S.E.2d at 596.

In *Jones v. State*, 322 S.C. 101, 470 S.E.2d 110 (1996), this Court similarly reversed the PCR court's dismissal of the PCR application for lack of standing. More akin to the present case, the applicant in *Jones* was incarcerated at the time that his PCR application was filed but

was released prior to his PCR hearing.[3] *Jones*, 322 S.C. at 101-02, 470 S.E.2d at 110. The Court found that "[a] petitioner has standing to petition for PCR if he is in custody or the results of his prior conviction still persist." *Id.* at 102, 470 S.E.2d at 110 (citing *Finklea v. State*, 273 S.C. 157, 255 S.E.2d 447 (1979); *McDuffie v. State,* 276 S.C. 229, 277 S.E.2d 595 (1981)). The Court analogized the United States Supreme Court's holdings that the habeas corpus proceedings were not defeated by the release of the prisoner prior to completion of the proceedings, finding that Jones similarly did not lack standing because the PCR application was filed prior to his release. *Id.* at 102, 470 S.E.2d at 110-11 (citing *Carafas v. LaVallee,* 391 U.S. 234 (1968); *Maleng v. Cook,* 490 U.S. 488, 491 (1989)).

In *Jackson v. State*, 331 S.C. 486, 489, 489 S.E.2d 915, 916 (1997), this Court recognized that the language of the PCR Act itself "does not contain an express 'in custody' requirement." Rather, "the Act allows a person who has been convicted of or sentenced for a crime to file an action." *Jackson,* 331 S.C. at 489, 489 S.E.2d at 916. This Court further wrote:

> Until recently, our cases suggested a PCR applicant must meet the federal habeas corpus "in custody" requirement in order to have standing. *See Finklea v. State,* 273 S.C. 157, 255 S.E.2d 447 (1979). However, "[a] petitioner has standing to petition for PCR if he is in custody *or* the results of his prior conviction still persist." *Jones v. State,* 322 S.C. 101, 102, 470 S.E.2d 110, 110 (1996) (emphasis added); *see also McDuffie v. State,* 276 S.C. 229, 277 S.E.2d 595 (1981). Thus, an applicant, regardless of whether he served jail time, may bring a PCR action if he demonstrates he is prejudiced by persistent results of his conviction. *Jones, supra; McDuffie, supra.*

Id. Thus, this Court ruled that "the trial court erred in holding petitioner must be in custody in order to have standing." *Id.* This Court further held: "Because petitioner alleged in his application and during the hearing he was suffering continuing consequences as a result of his alleged invalid conviction, petitioner is entitled to an evidentiary hearing to prove whether these

---

[3] Here, Brown remained incarcerated for a separate offense. App. 43 – 47.

persistent effects have prejudiced him." *Id.* at 489-90, 489 S.E.2d at 916. If Jackson was successful in establishing continuing prejudice as a result of the challenged conviction, the PCR court was instructed to "proceed in accordance with section 17-27-10 *et seq.*" *Id.* at 490, 489 S.E.2d at 917.

Here, the PCR court erred in ruling: "The State is not holding him on this charge anymore, and therefore I don't believe PCR can be used to contest this matter." App. 31, ll. 1-3. Brown was still serving the three year sentence for PWID marijuana when he filed his PCR application such that, like the applicant in *Jones*, *supra*, he was in custody at the time of filing. The holding in *Jones* implies that filing of the PCR application while in custody alone is sufficient to satisfy the standing requirement of the PCR Act. *Jones v. State*, 322 S.C. 101, 102, 470 S.E.2d 110, 111 (1996) ("Here, petitioner filed his application for PCR prior to his release. Therefore, the PCR judge erred in holding petitioner did not have standing and dismissing the petition.").

Respondent may attempt to distinguish *Jones*, as the State's claim here was not that Brown lacked standing to file the initial application, but that his claims became moot upon the completion of service of his sentence during the pendency of the PCR action. The *Carafas* decision, cited in *Jones*, is instructive. In rejecting the government's mootness argument, the *Carafas* Court wrote:

> It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these disabilities or burdens which may flow from petitioner's conviction, he has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him. On account of these collateral consequences, the case is not moot.

391 U.S. 234, 237-38 (1968) (internal quotations and citations omitted). The Court likewise found that there was no jurisdictional problem, finding instead that "once the federal jurisdiction

has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application." *Id.* at 238. The *Carafas* Court noted that the federal habeas statute "does not limit the relief that may be granted to discharge of the applicant from physical custody," but rather allowed for a broad spectrum of relief. *Id.* at 239. Noting that the petitioner was in custody when he filed his application, the Court found that he was entitled to consideration of his application for relief on its merits, explaining: "There is no need in the statute, the Constitution, or sound jurisprudence for denying to petitioner his ultimate day in court." *Id.*

There are many legitimate reasons that a PCR hearing may not be held prior to completion of a PCR applicant's sentence, including scheduling limitations in rural counties, availability of necessary witnesses, and necessary continuances. *See Carafas*, 391 U.S. at 240 (noting the inevitable delays in our court processes). However, the fact that Brown's PCR hearing was not held until twenty-two months after his application was filed, such that he completed service of his sentence in the intervening period, did not work to defeat Brown's claim for relief. *See Jones*, 322 S.C. at 102, 470 S.E.2d at 110-11; *cf. Hayes v. State*, 413 S.C. 553, 558, 777 S.E.2d 6, 9 (Ct. App. 2015) (finding PCR claim that sentence expired and continued detention was unlawful was moot once Petitioner was no longer incarcerated, but finding issue raised capable of repetition but evading review). Brown was in custody at the time that he filed his PCR application and his case should have been considered on the merits.

In the PCR court's written order, the court emphasized Brown's failure to allege that he was suffering collateral consequence from his conviction in his original PCR application or in a subsequent amendment. App. 37. As discussed *supra*, when Brown filed his original application on November 20, 2014, he was still in custody for the PWID marijuana offense. App. 19. It was

not until the September 16, 2016 hearing that the State made its oral motion for summary judgment. App. 27. Thus, Brown's oral response to the motion was proper. The *Jackson* case cited in the Order of Dismissal is inapposite, as it involved an applicant who was no longer in custody when he filed his PCR applications. *See* App. 37; *Jackson v. State*, 331 S.C. 486, 489 S.E.2d 915 (1997). It was Jackson's lack of custody when his application was filed that triggered the necessity that he include an allegation that the results of his conviction persisted in his application. While Brown maintains that the "custody" or "persistent results" requirement relates to standing to file the PCR action, assuming *arguendo* that Brown was require to show that he was suffering continuing consequences as a result of his alleged invalid conviction in response to the State's motion, like Jackson, he was entitled to an evidentiary hearing to determine prejudice.

CONCLUSION

Based on the foregoing, Petitioner Samuel Brown, Jr. respectfully requests that this Court grant the petition for writ of certiorari and remand his case for an evidentiary hearing.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Jean H. Toal, Circuit Court Judge

SAMUEL BROWN, JR.,

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 Judah VanSyckel, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Samuel Brown at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 13th day of July, 2017.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 13th day of July, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027 .