

STATE OF SOUTH CAROLINA

ORIGINAL

IN THE SUPREME COURT

Certiorari to Oconee County

Honorable Brooks P. Goldsmith, Circuit Court Judge

RECEIVED

AUG 24 2017

DAVID LEE COWARD,

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001358

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Coward's motion to relieve counsel was raised at the PCR hearing and ruled upon by the PCR court. App. 248, l. 15 – 255, l. 12. Respondent contends that the issue raised on appeal is tantamount to a claim of ineffective assistance of PCR counsel, an allegation not cognizable under state law. See Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) (holding that an applicant may not maintain successive application for PCR on ground that the first complete PCR application was insufficient due to ineffective PCR counsel). This case is distinguishable from Aice because Coward did not file a successive application alleging that PCR counsel was ineffective. Rather, he made a pre-hearing motion to relieve counsel because he knew that PCR counsel had not adequately conferred with him and conducted no investigation in his case. Whether the trial court abused his discretion in denying that motion is properly before this Court. See, e.g., Richardson v. State, 377 S.C. 103, 659 S.E.2d 493 (2008).

Further, in response to Respondent's preservation argument, Petitioner is not suggesting that this Court rule on the allegations that were not raised at the PCR hearing and grant him a new trial. Obviously Coward did not present any evidence or testimony regarding those allegations at the PCR hearing – he did not mention them in his application and his PCR attorney never reviewed the case thoroughly enough to discover them. Rather, the potential allegations that were missed by PCR counsel demonstrate why Coward's complaints against his attorney were not frivolous or for the purpose of delay, such that the PCR court abused its discretion in failing to grant the motion to relieve counsel. The proper remedy is not a new trial, but a new PCR hearing with competent PCR counsel.

Moreover, Respondent is incorrect in its assertion that the other potential claims cited in the petition are "meritless." The hearsay testimony offered by Russell Rogers was not

duplicative of testimony previously admitted over trial counsel's objection. The testimony offered by Debra Miller was only that after speaking with Coward's mother, she thought that her stolen property was at Coward's parent's house. App. 55, l. 12 – 56, l. 8. The trial judge specified that "[i]t's hearsay when she recites what [his] mother says" but that she is allowed to state that what she believed and that such belief was "because she received a call from his mother." App. 55, l. 24 – 56, l. 3. During Rogers testimony, he 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. Rogers' testimony was double hearsay, unless he actually heard Coward's mother on the phone with Miller's mother. In either case, it was objectionable.

The record further belies Respondent's contention that the testimony elicited by trial counsel related to Coward's friends purchasing alcohol, not Coward purchasing alcohol for underage minors himself. In fact, the following exchange occurred:

COUNSEL: So how old were you in July of '07?

ROGERS: Seventeen.

COUNSEL: Seventeen. And you were drinking?

ROGERS: Yes, sir.

COUNSEL: Where did you get the beer when you would go down to Debra's house? Did she furnish it?

ROGERS: No, sir. Most of the time David would get one of his friends to buy it or something.

COUNSEL: David would get it for you?

ROGERS: Yeah. He has a way at this little – there's a store in Salem called Jake's, and even before he was 21 **he could go in there and buy beer.**

COUNSEL: Do you know how old he is?

ROGERS: No, sir.

COUNSEL: So he was 15 or 16 years old and he's buying beer for you; is that what you're telling this jury?

ROGERS: I mean, I know he's 20, 21 years old at least.

COUNSEL: Now?

ROGERS: **And he was under age buying beer for me, yes.**

App. 81, l. – 82, l. 7 (emphasis added).


Again, contrary to Respondent's assertion that the trial court overruled the hearsay objection during Scott Arnold's testimony, the record reflects that the judge instructed the solicitor: "He can testify about his investigation, who he talked to and as a result of who he talked to did he do anything." App. 121, ll. 15-24. Arnold was not permitted to testify specifically about the content of any statements made to him. However, prior to the objection, Arnold had already testified that Roger's mother told him "that Cindy Coward had called her and told her that you know, that David and them [sic] had broken into her house." App. 125, ll. 17-19. Cindy Coward did not testify at the trial. Her hearsay statements were not admissible. Trial counsel should have made an accompanying motion to strike.

These allegations, along with an investigation into whether Russell Rogers testified truthfully regarding his lack of plea negotiations in exchange for his testimony, were all missed by PCR counsel. See App. 78, l. 20 – 79, l. 1; App. 250, ll. 23-25. They reflect that Coward's motion to relieve counsel was not "[a] mere disagreement between an applicant and his counsel." Richardson v. State, 377 S.C. 103, 106, 659 S.E.2d 493, 495 (2008). Rather, the motion was the result of a PCR attorney who failed to meet even the low threshold set by Rule 71.1(d), SCRPC ("Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary."). Coward was specific in his reasoning, distinguishing his case from that of State v. Graddick, 345 S.C. 383, 386, 548 S.E.2d 210, 211 (2001) (finding

no error in denial of motion to relieve counsel where “appellant made only the most conclusory arguments why counsel should have been relieved”). See App. 249, l. 10 – 250, l. 1; App. 252, ll. 19-24; App. 253, l. 12 – 254, l. 6. PCR counsel even admitted that he reviewed only portions of the trial transcript. App. 253, l. 24 – 254, l. 4. It is difficult to imagine how counsel could possibly insure that all available grounds for relief are included in the application and file any necessary amendments without a full review of the trial transcript and in-depth discussion with his client. See Rule 71.1(d), SCRCF. It was evident that neither of those things occurred, such that the PCR judge erred in forcing Coward to continue with Mr. Welborn as counsel. Coward is accordingly entitled to a new PCR hearing.

CONCLUSION

For the reasons set forth herein and in the Petition for Writ of Certiorari, Petitioner David Coward respectfully requests this Court grant certiorari to allow full briefing on the issue raised in his Petition.


Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of August, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Oconee County

Honorable Brooks P. Goldsmith, Circuit Court Judge

DAVID LEE COWARD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

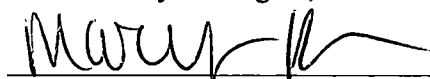
The undersigned hereby certifies that a true copy of the Reply to Return to Petition for Writ of Certiorari in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and David Lee Coward, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 24th day of August, 2017.



Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 24th day of August, 2017.

 (L.S)
Notary Public for South Carolina

My Commission Expires: May 12, 2027.