

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Oconee County

RECEIVED

Honorable Letitia H. Verdin, Circuit Court Judge

OCT 02 2017

WENDY MARIE MATHIS,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000181

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT.....3

CONCLUSION.....6

PETITION TO BE RELIEVED AS COUNSEL.....7

ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief where Petitioner was not notified of the evidentiary hearing and therefore could not have been unreasonably negligent in failing to prosecute her post-conviction relief application?

STATEMENT

Petitioner was charged with eight counts of financial transactional card fraud. App. 1. She was tried *in absentia* in Magistrate's Court in Walhalla, South Carolina by the Honorable Blake Norton. App. 1; App. 16 ll. 13 – 17. Upon information and belief, on May 29, 2013, she was sentenced to eight one-year sentences which were imposed to run concurrently. App. 2. Petitioner avers that she was not present at her trial. App. 2 – 3.

On December 20, 2013, Petitioner filed an application for post-conviction relief. App. 1. She alleged that her absence at trial led to an abuse of power by the presiding judge regarding her sentencing. App. 3. The State filed its Return on or about August 24, 2015.

An evidentiary hearing was held before the Honorable Letitia H. Verdin in Oconee County on October 24, 2016. App. 13. Petitioner was not present, and no testimony was taken. The State sought dismissal based upon Petitioner's alleged failure to prosecute. App. 18 ll. 4 – 7.

An Order of Dismissal was issued on December 28, 2016 and filed on January 20, 2017. App. 22 – 23. The PCR judge dismissed Petitioner's application based upon Petitioner's alleged failure to prosecute her action, under Don Shevey & Spires, Inc. v. Am. Motors Realty Corp., 279 S.C. 58, 301 S.E.2d 757 (1983).

This Petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner relief where Petitioner was not notified of the evidentiary hearing and therefore could not have been unreasonably negligent in failing to prosecute her post-conviction relief application.

At the evidentiary hearing, counsel for Petitioner indicated that because Petitioner was no longer incarcerated, he did not know of her whereabouts:

Judge, I can not actually say anything in defense of my client as to her allegations. She's not here. She's out of incarceration. I don't know where she is. I've tried to notify her. She left no forwarding address. So I will have to just say that's the best I can do for my client is what I've just said.

App. 17 ll. 14 – 25.

The undersigned, however, was able to locate Petitioner via a records request through the South Carolina Department of Probation, Parole and Pardon Services. Nonetheless, as a result of Petitioner's absence at the evidentiary hearing, the PCR judge agreed to sign the order of dismissal following Petitioner's alleged failure to prosecute. App. 18 ll. 8 – 9.

Based upon Don Shevey, *supra*, Petitioner's application for post-conviction relief was dismissed. ("Applicant has the burden of prosecuting her action, and this Court may properly dismiss an action for a plaintiff's neglect in proceeding with his cause.") App. 22. However, Petitioner's circumstances in the matter *sub judice* can be distinguished from the Appellant in Don Shevey.

The Appellant in Don Shevey failed to file a Summons and Complaint in a timely manner. 279 S.C. 58, 59, 301 S.E.2d 757, 758. "Appellant not only failed to timely file the Summons, it also failed to otherwise timely prosecute the case. Appellant took no action

between August 1976 and March 1879, when a Complaint was finally served twenty months after service of the Summons.” Id. at 60, 301 S.E.2d at 758.

Citing Thomas & Howard Company v. Fowler, et al., 238 S.C. 46, 119 S.E.2d 97 (1961), this Court in Don Shevey indicated that “[t]he plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff’s *unreasonable neglect* in proceeding with his cause.” Id. at 60, 301 S.E.2d at 758 (emphasis added).

However, Petitioner’s circumstances were unique, and there is no reason to believe she was unreasonably neglectful in failing to proceed with her post-conviction relief application. As Justice Harwell’s dissent in Don Shevey points out, changes in a party’s status warrant consideration. 279 S.C. at 61, 301 S.E.2d at 759. He believed that dismissal based upon failure to prosecute “sacrifice[d] substance to form.” Id. at 63, 301 S.E.2d at 760.

The same is true for Petitioner—Petitioner’s incarceration status had recently changed. It is unclear whether she was aware of the hearing. PCR counsel stated he was not aware of where she was. App. 17 ll. 21 – 22. Although he spoke of his attempt to notify her, he was unsuccessful. PCR counsel did not request a continuance in order to continue his efforts to reach Petitioner. Upon information and belief, the South Carolina Department of Probation, Parole and Pardon Services may have been able to provide him with her address and phone number.. However, because that did not occur, Petitioner was likely unaware of the hearing. The record does not reflect what efforts, if any, PCR counsel undertook in order to contact Petitioner.

A more recent opinion which cited Don Shevey, McComas v. Ross, held that dismissal was too harsh a sanction for a party who was not aware of an upcoming trial date:

In those cases where our supreme court has affirmed dismissal of actions based on a failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of

unreasonable neglect. See Small v. Mungo, 245 S.C. 428, 443, 175 S.E.2d 802, 804 (1970) (finding no abuse of discretion where counsel was apparently in his office and plaintiff and witnesses were at work when case was called for trial, and counsel informed the court that he could not appear for house); Bond v. Corbin, 68 S.C. 294 294-95, 47 S.E. 374, 374 (1904). In granting dismissal for failure to prosecute, there must be some showing of indifference to the rights of the defendant. E.g., Orlando v. Boyd, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996) (holding that precluding a witness from testifying was an abuse of discretion without a showing of willful disobedience with exclusion amounted to a judgment of default or dismissal).

368 S.C. 59, 62-3, 626 S.E.2d 902, 904 (Ct. App. 2006).

The Fourth Circuit Court of Appeals similarly held in McCargo v. Hedrick, 545 F.2d 393, 396 (4th Cir. 1976) that dismissal is a harsh sanction which “should be resorted to only in extreme cases.” Dismissal is generally permitted only in the face of a clear record of delay or contumacious conduct by the plaintiff. Id. The discretion should be exercised discreetly and only after due consideration of the availability of sanctions less severe than dismissal. Id.; Bush v. U.S. Postal Serv., 496 F.2d 42, 44 (4th Cir. 1974).

Under the Frequently Asked Questions portion of the South Carolina Bar’s website regarding Ethics¹, the following information is provided in response to an inquiry of steps a lawyer should take when a client cannot be found:

When a client disappears, two substantive issues come into play:

1. Without means of receiving information or directions from the client, may the lawyer terminate the relationship, and if so, how does the lawyer effect such termination?
2. What does the lawyer do with any property in his or her possession belonging to the absentee client, such as undisbursed funds, other property, or the file itself?

¹ <https://www.scbarr.org/lawyers/sections-committees-divisions/committees/ethics-advisory-committee/ethics-advisory-faqs/#10>.

A lawyer should take all prudent steps to locate a client who has effectively disappeared before the termination of representation. These efforts may include the use of Internet search services and private investigators, a review of Probate Court records, a search of newspaper articles and obituaries, and interviews with friends, neighbors, or relatives of the lost client.

The degree of reasonableness, or the depth of effort with which the lawyer conducts this search depends on any number of factors surrounding the relationship. If there are substantial sums of money at stake, if trial is imminent, or if a statute of limitations is about to expire, the lawyer is expected to exercise greater effort than if only routine matters remain, such as if the case has been closed and the only issue is to return the file to the client.

Petitioner could not have been unreasonably negligent in failing to prosecute her post-conviction relief action, because she was not aware of the evidentiary hearing. Counsel for Petitioner did not move to terminate the relationship, nor did he place on the record the steps he had taken to contact Petitioner. Through no fault of her own, Petitioner lacked information necessary to prosecute her post-conviction relief action.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant the petition for writ of certiorari to allow full briefing on this issue, reverse the charges against her, and remand the case for a new trial.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of October, 2017.

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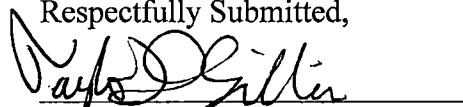
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Wendy Marie Mathis states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge Letitia H. Verdin, which was held on October 24, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
Therefore, counsel requests that the Court relieve him as counsel for Wendy Marie Mathis.

Respectfully Submitted,



Taylor D Gilliam

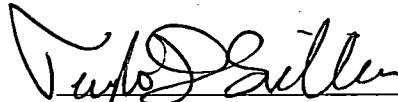
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of October, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix 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 a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Wendy Marie Mathis, at 4001 Pelham Road, Apt 437, , Greer, SC 29650, this 2nd day of October, 2017.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 2nd day of October, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: 5/12/2027