

Dear Clerk:

Please find enclosed inside Petitioner's Petition for Rehearing.

Albert Legare

09-01-2017

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S.C. SUPREME COURT

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S.C. SUPREME COURT

In The State of South Carolina

In The Supreme Court

Appeal from Charleston County

Court of Common Pleas

Honorable Deadra L. Jefferson, Presiding Judge

Appellate Case No: 2017-001084

Albert Legare,

Petitioner,

v.

State of South Carolina,

Respondent.

Petition for rehearing pursuant to Rule 221(a)

South Carolina Attorney General Office
Alicia A. Olive, Esquire
P.O. Box 11549
Columbia, SC 29211

Albert Legare
4848 Goldmine Hwy
Kershaw, SC 29067

Statement of Question

Whether Petitioner entitled to a rehearing in the interest of justice?

Statement of the case

In March of 1992, Petitioner was indicted for armed robbery, attempted armed robbery and assault and battery with intent to kill. In November of 1992 a jury found Petitioner guilty of all charges. He was convicted and sentenced to twenty-five (25) years imprisonment for armed robbery; twenty (20) years consecutive for assault and battery with intent to kill; and ten (10) years consecutive for attempted armed robbery.

Petitioner appealed his convictions and sentences. The Court of Appeals affirmed the matter pursuant to Rule 220. State v. Legare, Op. No. 95-Mo-020 (S.C. Filed January 13, 1995).

In February of 1995, Petitioner filed his original PCR application in which he alleged ineffective assistance of trial and appellate counsel and denial of due process of law. See Appendix pg _____. After an evidentiary hearing into the matter the PCR court found trial counsel ineffective and granted Petitioner a new trial based on the following grounds: (a) Failure to investigate. See PCR Order appendix pg 18 line 10-21, (b) Failure to interview witnesses. See PCR Order Appendix pg 18 lines 10-21, (c) Erroneous advice on the current law concerning preservation of his right to appeal based on exception. See PCR Order Appendix page 16 line 11-29, (d) Ineffective in his prosecution of his motion to exclude prior convictions. See PCR Order Appendix pg 16 line 4-10, (e) Failure to object to consecutive sentencing. See Appendix pg 18, line 4-6

The State petitioned for a writ of certiorari, which was granted by this court and the State raised the following grounds.

(1) Whether the lower court erred in granting Respondent a new trial where Respondent failed to show that he was prejudiced by trial counsel's representation in pursuing suppression of references to the respondent's prior criminal record?

(2) Whether the Lower court erred in granting Respondent a new trial where Respondent failed to show that he was prejudiced by trial counsel's representation in pursuing suppression of identification testimony?

(3) Whether the lower court erred in granting Respondent a new trial where Respondent failed to show that trial counsel failed to impeach a State

witness?

(4) Whether the lower court erred in granting Respondent a new trial where Respondent failed to show he was prejudiced by trial counsel's failure to request current sentences?

See Appendix Pg 21-41

However, PCR Appellate Counsel in his return raised the following grounds:

(a) Whether any evidence supports the decision of the PCR court to grant respondent a new trial, where counsel admitted errors kept respondent from testifying?

(b) Whether any evidence supports the decision of the PCR court to grant respondent a new trial where counsel was deficient in his challenge to identification testimony?

(c) Whether any evidence supports the PCR judge's grant of a new trial where trial counsel was ineffective in his impeachment of a key witness?

(d) Whether any evidence supports the trial court's ruling that trial counsel was ineffective by failing to request current sentences pursuant to the applicable statute?

(e) Whether the cumulation of attorney errors supports the grant of a new trial?

See Appendix pg 42-44

This Court reversed the PCR judge's grant of PCR on the following grounds:

- (I) Suppression of criminal record:
- (II) Suggestive line up:
- (III) Failure to call expert witness:
- (IV) Impeachment of witness:
- (V) Concurrent sentences.

The Petitioner filed this current Post-Conviction Relief Application October 14, 2015. In this current PCR Application Petitioner asserted as grounds for relief;

(1) PCR Appellate Counsel failed to assert the "failure to investigate" claim as an additional sustaining ground to uphold the PCR judge's grant

of PCR, it denied Applicant the right to seek appellate review on that claim which entitle Petitioner to an Austin v. State, 409 S.E.2d 395 (S.C.1991) review and S.C. Code Ann 17-27-100; See Appendix Pg 8

(2) Petitioner asserted he was entitled to "belated appeal" pursuant to Odom v. State, 523 S.E.2d 753 (S.C.1999) because he was deprived his "[o]ne full fair bite at the apple" because PCR Appellate counsel failed to raise the "[T]wo Issue Rule" and the Ineffective assistance of counsel claim, (Failure to investigate), in his statement of issues on appeal pursuant to Rule 208(b), (1), (b), SCACR and in his Petition for Rehearing. See Appendix Pg 11, Second paragraph

The Respondent filed a reply and motion to dismissed asserting Petitioner's application was time barred and successive under the Uniform Post-Conviction Relief Act. See Appendix Pg _____. Petitioner filed a Reply in opposition to the Respondent Reply and motion to dismiss with prejudice. See Appendix Pg 69. In Petitioner's Reply in opposition to Respondent Reply and motion to dismiss Petitioner asserted the statute of limitation and successive under the Uniform Post-Conviction relief Act was inapplicable to the instant case because he was not mounting a collateral attack upon his conviction and sentences under the Uniform Post-Conviction Relief Act and therefore an evidentiary hearing should be held in the interest of justice to cure a miscarriage of justice. See Appendix Pg 71-74.

The PCR Court issued a standard twenty (20) day Order to Petitioner to show cause why the Post-Conviction Relief Application should not be dismissed as being time barred and successive under the Post-Conviction Relief Act. See Appendix Pg 60-68. See Fn The PCR Court denied and dismissed the Application for failing to file his application timely and successive under the Post-Conviction Relief Act. See Appendix Pg 78-79.

Fn Petitioner has filed other PCR Application challenging his conviction and sentences.

Argument

Petitioner asserts this Court should grant a rehearing in the interest of justice. Here in the instant case Petitioner won his first PCR application on several ineffective assistance of counsel claims in which the PCR Court made specific finding of fact and conclusion of law on all claims in accordance with S.C. Code Ann §17-27-80 (Supp.1998). See Appendix page 13-19 (PCR Court reversing and vacating Petitioner's conviction and sentences). It's clear from the record on appeal that Respondent did not appeal the ineffective assistance of counsel claim at appendix page 18 line 10-21 in which the PCR Court made specific finding of fact and conclusion of law on pursuant to section 17-27-80. However, without the Petitioner nor Respondent appealing the claim this Court reversed the PCR Court entire Order even on the unappeal claim by both parties. See Albert Legare v. State, 333 S.C. 275, 509 S.E.2d 472, Submitted Nov. 19, 1997. Decided Dec. 14, 1998. Rehearing Denied Jan 6, 1999. See Fn1

Thus Petitioner has filed a total of six PCR Applications challenging the conviction and sentences but has never challenged this Court judgment in Legare v. State, supra in the

Fn1 Petitioner asserts the this Court judgment in Legare v. State, supra, is void ab initio because this court lack jurisdiction to reverse the PCR Order on the unappealed claim. See Jones v. Lott, 692 S.E.2d 900, 903 (S.C. 2010) (Where decision is based on more than one ground, the Appellate Court will affirm unless Appellant appeals all grounds because the unappealed ground will become law of the case); But see Smiley v. State, S.E.2d, 2015 WL 4464898 (S.C. 2015) where this court refused to reverse the PCR Court order because the Respondent failed to appeal all claims. Therefore, this Court should on its own vacate its judgment in Legare v. State, supra, in the interest of justice.

lower courts.See Fn2 Also another note worthy of information
Petitioner think this Court overlooked he filed a mandamus in
this Court very jurisdiction asking this Court to vacate this
Court's judgment in Legare v. State, supra. This Court denied the
mandamus. Petitioner also filed a habeas corpus in this Court
jurisdiction alleging this court judgment in Legare v.
State, supra were void and he was entitled to his immediate and
speedier release. Yet again this court denied Petitioner relief
and restricted him from any future filings in this Court original
jurisdiction and Petitioner ask this Court to take judicial
notice of these filings.

Likewise petitioner has been denied his fundamental
constitutional right to redress under the first amendment to the
United States Constitution. Petitioner has no vehicle to
challenge this Court judgment reversing the PCR Court order on
the unappealed claim because even on federal habeas corpus
Petitioner could only challenge what was before this Court and
the unappealed claim was not before the Court.See Ex parte
Royall, 117 U.S. 241 (1886); Wainwright v. Sykes, 433 U.S. 72, 78
(1977). Therefore, in the interest of justice this Court should on
its own grant a rehearing and vacate this Court judgment in
Legare v. State, supra pursuant to Smiley v. State, supra.

Secondly, Petitioner asserts this Court should grant
rehearing based upon Petitioner filed for a belated appeal under

Fn2 Petitioner asserts the lower court is without the authority and
jurisdiction to vacate this court judgment in Legare v. State, supra.

Austin v. State, 409 S.E.2d 753 (1991) and Odom v. State, 523 S.E.2d 753 (1999). Likewise the lower court found these claims were untimely under section 17-27-45(a)-Pelquin v. State, 469 S.E.2d 606 (1996). This Court found in Odom that the statute of limitation did not apply because he was not mounting a collateral attack on his conviction or sentences. Here Petitioner are not mounting a collateral attack on his conviction or sentences under the Uniform Post-Conviction Relief Act because he has mounted the collateral attack on his conviction and sentence and won. Here Petitioner is challenging a procedural error that occurred in this Court original jurisdiction. Petitioner asserts he was deprived his one full fair bite at the apple in Legare v. State, supra and he's challenging these procedural errors therefore his application should not be found to mounting a collateral attack on the conviction and sentences under section 17-27-90 which will make his current application successive under the Uniform Post-Conviction relief Act. Petitioner's case is therefore inopposit that of Aice v. State, 409 S.E.2d 392 (1991). Aice attempted to file claims mounting a collateral attack on his conviction and sentence under the Uniform Post-Conviction Relief Act that could have been raised in the original, supplemental and amended application. Here Petitioner could not have raise these claims of procedural errors in his original, supplemental and amended application. Therefore, the lower Court decision was improper because the statute of limitation does not apply to Petitioner's belated appeal according to the holding in Odom and should not be successive according to Odom because he is not mounting a collateral attack on his conviction or sentences.

Conclusion

It is respectfully asked that this Honorable Court grant a rehearing in the interest of justice.

1.

In The State of South Carolina
In The Supreme Court

Appeal from Charleston County
Court of Common Pleas

Honorable Deadra L. Jefferson, Presiding Judge

Appellate Case No: 2017-001084

Albert Legare,

Petitioner,

v.

State of South Carolina,

Respondent.

Certificate of service

I, Albert Legare, hereby certifies that I did mail a copy
of Petitioner's Petition for rehearing on Respondent;

South Carolina Attorney General Office
Alicia A. Olive, Esquire
P.O. Box 11549
Columbia, SC 29211

by depositing a copy in the mail with sufficient funds on this
09 day of September, 2017

Albert Legare

Abdullah # 191449

I. Oak B# 57

the Hwy

SC 29067



The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court

P.O. Box 11330

Columbia, SC 29211