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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lee County
Jocelyn Newman, Circuit Court Judge

ERNEST TONEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. When for nearly twenty-seven months Trial Counsel failed to inform Petitioner that a notice of appeal had not been filed, was it improper to summarily dismiss Petitioner's Ineffective Assistance of Counsel claims based on the statute of limitations?

II. Did Petitioner knowingly and intelligently waive his right to appeal?

STATEMENT

Gregory Rogers, hereinafter Decedent, and Petitioner had a tense relationship. App. 459, l. 16. For many years prior to Decedent's death, Petitioner had been openly carrying on an affair with Decedent's wife, Lorie Rogers. App. 435, ll. 9-16. Decedent had known about the affair for years or prior to his death. App. 437, ll. 1-16. The affair produced a daughter who was four years old at the time of Decedent's death. Despite the long term affair, Lorie and Decedent still lived together in the house with Petitioner's daughter.

Decedent had a reputation as a mean drunk who did no shy away from a fight. App. 456, ll. 1-10; App. 457, l.10—458, l. 4; App. 469, ll. 2-6. On September 12, 2010, Decedent was drunk and, true to his character, something ignited his temper. App. 371, ll. 23-25. App. 423, ll. 12-13.

At approximately 3:00 to 3:30 p.m., Decedent came home angry. App. 423, ll. 12-13. He retrieved his .30-30 rifle. App. 424, l. 2—425, l. 17. Descendent then left the house with the .30-30 rifle. After he left, Lorie Rogers called Petitioner and warned him that Decedent had a gun and to stay away from him. App. 467, ll. 22-25.

Lorie Rogers would later claim that Decedent returned home with the rifle after "approximately seven minutes." App. 425, l. 19. However, approximately an hour after Decedent left his house, Decedent was recorded by a security camera purchasing .30-30 ammunition from the Wal-Mart thirty-five minutes from home. App. 519, l. 18—520, l. 9.

After leaving Wal-Mart around 4:30 p.m., Decedent drove back toward his home in Lee County. At approximately 6:00 p.m., it was reported that Decedent was laying on the side of the road three tenths of a mile from his home. App. 254, ll. 9-17; App. 424, l.18—425, l. 2.

At trial, the State introduced the following statement that investigators attributed to Petitioner:

> I left home yesterday around 2:00 p.m...I called Lorie Rogers to talk about a date. I went up to park on the paved road and took a piss. [Decedent] pulled up in front of me and jumped out. He said, Mother Fucker, what are you doing here get out of her, and I said this is a public highway, Mother Fucker, stay here until I get back [Decedent] said as he got in his truck. I called Lorie back. Lorie said [Decedent] had a gun. I told Lorie I'm not worried about no gun. When I looked up [Decedent] was pulling up. [Decedent] jumped out of his car with a long gun. I was standing on the outside of my truck. I got my 8 millimeter rifle from behind the seat. I shot it one time. [Decedent] fell to the ground. I jumped in my truck and went to my mother's house.

App. 504, l. 5—505, l. 1.

When law enforcement arrived on the scene, they found Decedent had been killed by a single gunshot wound. However, they were unable to locate Decedent's .30-30 rifle.

After the shooting, law enforcement thoroughly searched Decedent's home for the .30-30 rifle on. App. 559, l. 25—560, l. 4. Included in that search, the officer's searched under the beds of Decedent's home. App. 561, ll. 10-12. The only weapon found was a pistol with obliterated serial numbers. App. 560, ll. 5-9.

Two days after the search, a member of Decedent's family contacted law enforcement and claimed to have found the .30-30 rifle under a bed that was previously searched by law enforcement. App. 560, l. 20—561, l. 6. Law enforcement was unable to get a "straight answer" as to how the .30-30 rifle appeared two days after the search. App. 562, l. 15—563, l. 1.

On September 29, 2011, Petitioner was indicted by the Lee County Grand Jury. App. 771. On December 10, 2012, Petitioner proceeded to trial before the Honorable George C. James and a jury. App. 1. For trial, Petitioner was represented by Shaun C. Kent and Ray E. Chandler, hereinafter referred to collectively and individually as Trial Counsel. The State was represented by Paul M. Fata.

At trial, Trial Counsel presented the defense of self-defense. As part of this defense, Trial Counsel sought to introduce evidence of Decedent's violent nature. However, Trial Counsel did not seek a pre-trial immunity determination under.

Petitioner was convicted of Murder. The trial court sentenced Petitioner to forty years in prison. App. 736, ll. 11-16.

After his conviction, Petitioner wanted to appeal his conviction and sentence. App. 764, ll. 17-19. Petitioner spoke to trial counsel about the appeal on several occasions. App. 764, ll.15-17. Petitioner asked Trial Counsel to file a direct appeal. App. 764, ll. 13-22. For nearly twenty-seven months after the direct appeal, Petitioner awaited a decision from the appellate court. App. 740.

"Within days" of Petitioner's conviction, Mr. Kent left the firm of Coffey, Chandler and Kent. App. 764, ll. 4-12. Mr. Kent was busy running for state senate. App. 764, ll.7-8. Mr. Kent indicates that the file remained with Mr. Chandler; however believes that Petitioner was confused about who had his case. App. 764, ll. 8-12.

On March 13, 2015, Mr. Kent wrote Petitioner a letter with an Application for Post-Conviction Relief and indicating that he had scheduled a telephone conference. App. 750. Prior to this letter, Petitioner believed that a direct appeal had been filed. App. 740-748.

On May 8, 2015, Petitioner filed an Application for Post-Conviction Relief. App, 738-749. In the Application, Petitioner alleged the following allegations of ineffective assistance of counsel:

> Counsel failed to investigate, develop, and present all available, relevant and admissible evidence.
>
> Counsel failed to present expert witnesses i.e. handwriting-expert to expose a fraudulent signature on a fraudulent statement.
>
> Counsel failed to object on all possible grounds to inflammatory and irrelevant evidence presented by the prosecution. As a result of counsels failure to make all appropriate objections, applicants sentence is unreliable.

> Counsel instructs applicant to list all grounds in which he would be entitled to post-conviction relief, which counsel did not timely file appeal, left applicant without a transcript to fully review all his grounds for relief.

App. 746-749; App. 752; App. 768.

In the verified[1] Application, Petitioner also states the following:

> The Applicant in this matter has been awaiting a decision from his direct appeal, instead nearly 27 months later he receives a PCR application from his trial counsel...Counsel completely failed not only to file a timely appeal but also neglected to notify his client of his inaction.

App. 740.

On July 9, 2015, the State filed a "Return and Motion to Dismiss All Claims but *White v. State*. App. 751-755.

A PCR hearing was convened on July 26, 2016 before the Honorable Jocelyn Newman. App. 757. For this hearing, Petitioner was represented by Lance Boozer and the State was represented by Julie A. Coleman.

Prior to the hearing beginning, the State consented to a belated appeal but "mov[ed] to dismiss all other claims as untimely, past the Statute of limitations." App. 761, ll. 1-3.

Prior to any testimony, the following exchange tool place:

> Mr. Boozer: So, I would like to put on the record that we do oppose the motion to dismiss based on the statute of limitations because he did -- he thought that he had a direct appeal pending. He didn't know his lawyer had not filed a direct appeal, so he didn't go ahead and pursue his PCR claims that he had. So, that would be our response to the motion to dismiss for statute of limitations.
>
> The Court: Ms. Coleman.
>
> Mr. Coleman: I would just argue that the statute of limitations is clear in its setting boundaries for filing, and case law supports it.
>
> The Court: All right. I don't know any way around that.

[1] In the pro se PCR application there is a section requiring the applicant to verify, under oath, that "the matters and allegations therein set forth are true." App. 744.

App. 762, ll. 3-16.

After the PCR Court summarily dismissed the all claims other than the *White v. State* claim, Petitioner did not call any witnesses. App. 762, 20-22. Instead the State, allowed Mr. Kent to testify concerning why an appeal was not filed. App. 763—764.

The PCR Court issued an order[2] that was filed on August 25, 2016. App. 767-769. In that order the PCR Court noted the following:

> At the outset of the hearing, Respondent renewed its Motion to Dismiss All Claims But *White v. State* as being untimely for being filed past the one year statute of limitations. This Court granted that motion and proceeded solely on the claim of relief under *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974).

App. 768.

This appeal follows.

[2] This order was titled Consent Order of Dismissal and Grant of Appeal Pursuant to *White v. State*. App. 767. However, this order was not signed by Mr. Boozer, and there is no indication in the record that Petitioner consented to the dismissal of claims not made under *White v. State*.

ARGUMENT

I. When Trial Counsel waited nearly twenty-seven months to inform Petitioner that a notice of appeal had not been filed in his case, was it improper to summarily dismiss Petitioner's Ineffective Assistance of Counsel claims based on the statute of limitations?

Relevant Facts

Prior to the beginning of the hearing, Petitioner argued that he did not pursue his PCR claims within the statute of limitations because he did not know that Trial Counsel failed to file his direct appeal. App. 762, ll. 6-8. This was supported by the *verified*[3] PCR Application that states:

> The Applicant in this matter has been awaiting a decision from his direct appeal, instead nearly 27 months later he receives a PCR application from his trial counsel...Counsel completely failed not only to file a timely appeal but also neglected to notify his client of his inaction.

App. 740; *See Dawkins v. Fields*, 354 S.C. 58, 67, 580 S.E.2d 433, 438 (2003) ("We agree with the Court of Appeals' well-supported conclusion that a verified complaint is an acceptable substitute for an affidavit at the summary judgment phase as long as the pleading satisfies Rule 56(e).").

Despite the fact that this argument was raised to the PCR Court, PCR Court ruled against Petitioner. In ruling on the matter the PCR Court noted, " I do not know anyway around [the statute of limitations]." App. 762, ll. 14-15. Therefore, the PCR Court, "proceeded solely on the claim of relief under *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974)." App. 768.

Argument

Summary dismissal is only appropriate when, "there is there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." S.C. Code § 17-27-70(c). "When considering the State's motion for summary dismissal, where no evidentiary hearing has

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[3] App. 744 ("I, Ernest Toney, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.").

been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant." *McCoy v. State*, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013).

The PCR Court, summarily dismissed Petitioner's claims based on the statute of limitations. App. 768. Although there is generally a one year statute of limitation on Post-Conviction Relief actions, the PCR statute of limitations have not been applied when it denies an applicant his "right to one fair bite at the apple." *See Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002). Additionally, under rare circumstances the doctrine of equitable tolling can extend a statute of limitations. *See Pelzer v. State*, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008).

The PCR Court's application of the statute of limitations denied Petitioner his "one fair bite at the apple."

This Court has held:

> "A defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal and one PCR application."

Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002).

In *Wilson*, the sole issue before the Court was whether "the statute of limitations for PCR applications, S.C. Code Ann. § 17-27-45(A), apply to an applicant who alleges that he did not knowingly and intelligently waive his right to a direct appeal from his criminal conviction." *Id.*, 348 S.C. at 217, 559 S.E.2d at 582. Wilson had requested an appeal from his trial attorney but the attorney did not file a timely appeal. Two years after his conviction "Wilson filed an application for PCR alleging ineffective assistance of counsel, the evidence against him was insufficient to secure an indictment, and the trial judge was not impartial." *Id.*, 348 S.C. at 216-17, 559 S.E.2d at 582. The Court remanded Wilson's case finding the following:

> Just as it was in Odom, Austin's policy would be frustrated if the one year statute of limitations for PCR claims applied where the applicant was denied his direct appeal due to ineffective assistance of counsel, and then was denied his right to a PCR application because of the one year statute of limitations.

Id., 348 S.C. 218, 559 S.E.2d 583.

The Conclusion of the *Wilson*, does not specifically address any of Wilson's non-*White v. State* issues; instead, the court directed remand "to conduct an evidentiary hearing to determine if Wilson knowingly and intelligently waived his right to direct appeal." However, the absence of addressing the non-*White v. State* claims should not be seen a limitation to the holding. In order for Wilson to prevail on any of his claims, he would have had to of demonstrated that he did not knowingly and intelligently waive his right to a direct appeal. Otherwise, he would have knowingly waived the non-*White v. State* by failing to pursue them.

In the present case, Petitioner did not waive his right to a direct appeal. App. 765, ll. 3-4; App. 768. For the same reasons, Petitioner never knowingly and intelligently waived his right to file a PCR alleging ineffective assistance of Counsel. It would be unjust to penalize Petitioner for filing a late PCR application, when the delay was caused by Trial Counsel's failure to notify Petitioner that the notice of appeal was never filed. App. 740.

In Sum, Petitioner has a right to one direct appeal, and one PCR. The PCR court's ruling has left him with only half of a "fair bite at the apple."

Petitioner was entitled to equitable tolling.

Equitable tolling is available when Equitable tolling has been appropriate when:

> 1) extraordinary circumstances prevented the applicant from filing despite his or her diligence;
> 2) the applicant actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass;

> 3) the applicant, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.

See Pelzer, 378 S.C. at 521, 662 S.E.2d at 620-21 *citing* 51 Am. Jur. 2d *Limitation of Actions* § 174 (2007)). However, equitable tolling does not require a showing of wrong doing on behalf of Respondent. *See id.* ("However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation.").

In the present case, Petitioner wanted his Trial Counsel to file a notice of appeal. App. 764, ll. 13-19. He actively and diligently pursued his right to a direct appeal by speaking to Trial Counsel on several occasions about the direct appeal. *See Pelzer, supra.* For nearly twenty-seven months, Petitioner believed the direct appeal was pending. App. 740; App. 762, ll. 5-6.

Trial Counsel did not tell him his direct appeal was not filed until March 13, 2015. App. 740; App. 748; App. 750. This breakdown may have been caused by confusion as to who would file the appeal after Mr. Kent and Mr. Chandler ended their business relationship. App. 764, ll. 4-12. However, it was not caused by Petitioner. Petitioner was doing what he was supposed to and patiently waiting for his direct appeal to be decided, before filing a PCR Application. App. 762, ll. 6-8. Upon learning that the direct appeal had not been filed, Petitioner diligently acted to file PCR Application.

The PCR court erred in dismissing his ineffective assistance of counsel claims under the statute of limitations. Petitioner was entitled to equitable tolling. *See Pelzer, supra.* The reason that his PCR application was not filed within a year of his conviction had not thing to do with Petitioner's lack of diligence. Extraordinary circumstances outside Petitioner's control lead to the delayed filing. Therefore, Petitioner was entitled to equitable tolling.

II. Petitioner did not knowingly and intelligently waive his right to a direct appeal

Petitioner alleges that he did not knowingly and intelligently waive his right to a direct appeal. This was affirmatively found by the PCR Court. App. 769. Additionally the State concedes that Petitioner is entitled to a belated direct appeal. App. 765, ll. 3-4. Pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) and Rule 243(i)(1), SCACR, Petitioner respectfully request that this Court review the issues raised in Petitioner's brief.

CONCLUSION

Petitioner respectfully requests this Court grant certiorari to consider whether this case should be remanded.

Respectfully submitted,

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