

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Spartanburg County

Honorable J. Mark Hayes, Circuit Court Judge

ORIGINAL

ROBERT A. YOUNG

PETITIONER,

v.

THE STATE

RESPONDENT

APPELLATE CASE NO 2017-001544

PETITION FOR WRIT OF CERTIORARI

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The circuit court erred in denying Petitioner Young’s DNA application because the judge erroneously relied in part on the state’s response where the state argued that Petitioner Young’s DNA application was not timely filed pursuant to Section 17-28-30 (B) which mandated a seven year limit for those who entered a guilty plea which was in error because Petitioner Young had a trial so the correct statute was Section 17-28-30(A) which did not specify a time limit.5

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ISSUE PRESENTED

Did the circuit court err in denying Petitioner Young's DNA application because the judge erroneously relied in part on the state's response where the state argued that Petitioner Young's DNA application was not timely filed pursuant to Section 17-28-30 (B) which mandated a seven year limit for those who entered a guilty plea which was in error because Petitioner Young had a trial so the correct statute was Section 17-28-30(A) which did not specify a time limit?

STATEMENT

Petitioner Robert Young was indicted by the Spartanburg Grand Jury on February 22, 2007 for Armed Robbery (07-GS-42-0998), Assault and Battery with Intent to Kill (07-GS-42-0996), and Grand Larceny (07-GS-42-0997). On February 4-6, 2008, Young proceeded to trial before the Honorable J. Derham Cole, and a jury. Young was represented by William H. McPherson, Esquire, and the state was represented by Derrick B. Balsa and Lauren Barnwell. App. 1.

At trial, the victim, Dixon Ijioma who was a local cab driver, testified that Petitioner Young shot him twice in the back of his head while robbing him late on the night of November 1st, 2006. Ijioma testified that Young was a regular customer and that he had picked him up several times in the past year. App. 112, lines 2-4. He identified Young as the shooter. App. 124, ll. 24 – App. 125, ll. 1. Young called alibi witnesses on his behalf during the trial. App. 312, ll. 10 – App. 331, ii.7. Ijioma also picked Young out of a lineup. App. 204, ll.13- App. 205, ll. 3. The State established that Ijioma's blood was found on Young's clothing. App. 289, ll. 20-22. Young did not testify on his own behalf. App. 300, ll. 1 – 22.

Mary Ann Shehan, the DNA expert with SLED, testified that she received several cuttings from Petitioner Young's pants for DNA testing. One cutting, Item 3.1, had DNA that matched the victim's DNA. App. 288, ll. 3 - 24. Two other cuttings from Young's pants and one cutting from his shirt had Ijioma's blood on them. App. 289, ll. 1 – 22. Another cutting from Young's pants had a mixture where the major contributor was from an unidentified male. App. 289, ll. 23 – App. 290, ll. 25.

The jury returned a verdict of guilty on the armed robbery and assault and battery with intent to kill, but a not guilty on the grand larceny. App. 380, ll. 18 – App. 381, ll. 11. The judge sentenced Petitioner Young to thirty years incarceration on the armed robbery and twenty years

on the assault and battery with intent to kill. The sentences were to run consecutive to each other. App. 383, ll. 21 – App. 384, ll. 23.

Young's attorney filed a notice of appeal. The appeal was perfected by the Office of Appellate defense. The South Carolina Court of Appeals affirmed Young's convictions and sentences on June 28, 2010. State v. Young, Op. No. 2010-UP-0333 (Ct. App. filed June 28, 2010). App. 386.

On October 18, 2010, Young filed an application for post-conviction relief (PCR). App. 387. The state filed a return on July 15, 2011. App. 396. On November 22, 2011, the telephone deposition of William McPherson, trial attorney who then resided in Texas, was conducted by the state's attorney and Petitioner's attorney. App. 420. Young was represented by J. Kenneth Robertson, and the state was represented by Suzanne H. White. App. 401. On December 5, 2011, an evidentiary hearing was held before the Honorable J. Mark Hayes, II. Young was again represented by James Robertson, and the state was represented by Suzanne White. App. 401. On March 16, 2012, Judge Hayes issued an order denying Young's PCR application and dismissing it with prejudice. App. 446 – App. 455. Young's attorney filed a notice of appeal. The Court of Appeals issued an order on December 12, 2014 denying Young's petition for a writ of certiorari on his appeal. App. 481.

On May 25, 2016, Petitioner Young filed an application for forensic DNA testing. Young wrote that he was not at the scene of the crime. Supp. App. 1-5. The state filed a response on June 1, 2016. The state argued that DNA testing had already been conducted but that Young's identity was proven by other means as well. The state argued that the victim identified Young as the perpetrator in a photo lineup. The state wrote that additional DNA testing would only re-open the pain for the victim. App. 482-App. 483.

On June 9, 2016, Judge R. Keith Kelly issued an order dismissing Young's DNA application pursuant to Section 17-28-50(C). This order was issued without an evidentiary hearing. Judge Kelly found that the results of the DNA testing were presented at trial; the victim's blood was on the defendant's clothing; the defendant was allowed to present alibi witnesses at trial; and the trial attorney's effectiveness were reviewed by the appellate process and PCR process. App. 484-App. 485.

On May 26, 2017, Young filed a second application for forensic DNA testing. Supp. App. 6-11. Young argued that "if the test was subjected to testing, it would produce exculpatory results that would constitute new evidence and would change the results of the conviction." Supp. App. 8.

The state argued in their response filed May 29, 2017 that Young's DNA application should be dismissed because it was not timely filed. The state cited Section 17-28-30 (B) and argued that Young's application had to be filed no later than seven years from the date of sentencing. The state argued that Young's application was filed May 26, 2017, which was more than seven years from the sentencing date of February 6, 2008. App. 486.

Judge J. Mark Hayes issued an order on July 6, 2017 dismissing Young's DNA application. The judge in his decision relied in part on the state's response, and also "incorporated" the order of Judge Kelly issued June 9, 2016. The judge focused more on the sentence modification than on the DNA application although he denied both requests. App. 487 – App. 488; Supp. App. 15.

ARGUMENT

The circuit court erred in denying Petitioner Young's DNA application because the judge erroneously relied in part on the state's response where the state argued that Petitioner Young's DNA application was not timely filed pursuant to Section 17-28-30 (B) which mandated a seven year limit for those who entered a guilty plea which was in error because Petitioner Young had a trial so the correct statute was Section 17-28-30(A) which did not specify a time limit.

In 2008, the South Carolina General Assembly passed the Access to Justice Post-Conviction DNA Testing Act to permit incarcerated individuals, who had been convicted of certain offenses, access to DNA testing. On January 1, 2009, the Act became effective. S.C. Code Ann. § 17-28-10, et seq.

By Order dated January 29, 2009, the South Carolina Supreme Court adopted Rule 247 as an amendment to the South Carolina Appellate Court Rules governing the procedures for certiorari to review DNA testing decisions.

The Access to Justice Post-Conviction DNA Testing Act provides in 17-28-30(A):

A person who pled not guilty to at least one of the following offenses, was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or a biological material related to his conviction or adjudication.

S.C. Code Section 17-28-30(A).

Therefore, to apply for forensic DNA testing under this subsection, a person must satisfy four requirements: (1) the person must have pled not guilty to an enumerated offense; (2) the person must have been convicted of the offense; (3) the person must be incarcerated for the offense; and (4) the person must assert his innocence of the offense.

Section 17-28-30(B) of the Act applies to people who pled guilty or no contest to one of the enumerated offenses. Specifically, the statute provides:

A person who pled guilty or nolo contendere to at least one of the offenses enumerated in section (A), was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of DNA and any physical evidence or biological material related to his conviction or adjudication no later than seven years from the date of sentencing.

S.C. Code Ann. § 17-28-30(B)(emphasis added).

Therefore, to apply for forensic DNA testing under 17-28-30(B), a person must satisfy five requirements: (1) the person must have pled guilty to an enumerated offense; (2) the person must have been convicted of the offense; (3) the person must be incarcerated for the offense; (4) the person must assert his innocence of the offense; and (5) the person must apply for forensic DNA testing no later than seven years from the date of sentencing.

The plain language of the statute makes it clear that subsection (A) applies to individuals who pled not guilty. On the other hand, the plain language of the statute makes it clear that subsection (B) applies to individuals who pled guilty. Only subsection 30(B) has a time limit which is seven years.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted). Where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. Id. (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)).

In the case of Orlando Smith v. State, 412 S.C. 472, 772 S.E.2d 286 (Ct. App. filed May 13, 2015), Smith had applied for DNA testing pursuant to Section 17-28-30 following his conviction of murder after a jury trial. His DNA application was dismissed by the circuit court as untimely. The Court of Appeals reversed and remanded Smith's case. The Court held:

When the statute is read in full, particularly without omissions, the only interpretation is the seven year limit only applies to those who pled guilty or no contest. Because the subsection that applied to those who pled not guilty does not include such a limitation, nothing indicates the legislature intended a time limit for defendants who pled not guilty. Therefore, the circuit court erred in applying subsection B to Smith and finding the seven year time limit barred his Application. Accordingly, we reverse the circuit court's decision and remand for the circuit court to consider Smith's application.

Orlando Smith v. State, 412 S.C. 472, 772 S.E.2d 286 (Ct. App. filed May 13, 2015).

In Petitioner Young's case, he was convicted following a jury trial. Therefore, Section 17-28-30(A) would apply to his DNA application which meant there was no time limit. The state's argument that Young's application should be denied because it was filed untimely was incorrect because the wrong subsection of the statute was cited. The state relied on and cited in their response Section 17-28-30 (B) which applies to people who pled guilty.

The judge erred in relying even in part on the state's response in dismissing Young's DNA application. The judge provided scant reason for dismissing Young's DNA application except to state that he relied on the State's response and Judge Kelly's order of dismissal from June 9, 2016 which addressed Young's first DNA application.

By the judge relying on the state's response, the judge was relying on the incorrect section of the statute: 17-28-30(B). The judge should have relied on 17-28-30(A).

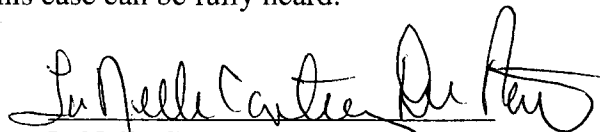
The judge's order focused primarily on Young's sentence modification request. Supp. App. 1.

The order makes no provision for Young to provide a response to the order. No hearing was held in either Young's first DNA application nor in his second application. He should have been able to argue his case before the judge in a hearing. Section 17-28-50(C) provides: "The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed, grant leave to file an amended application, or direct that the proceedings otherwise continue."

There was no evidence that Young knew he could reply. Without a hearing, Young was prejudiced because he could not argue his case before the judge in court.

CONCLUSION

Based on the above, Petitioner Young respectfully requests that this Court grant his petition for a writ of certiorari, and remand his case for the circuit court to consider Young's DNA application by holding a hearing so that his case can be fully heard.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of January, 2018.

STATE OF SOUTH CAROLINA

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ROBERT A. YOUNG

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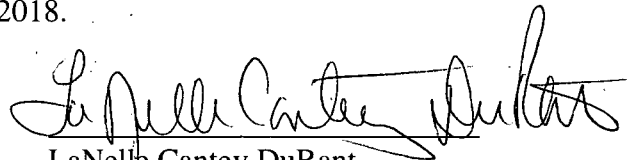
v.

THE STATE

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 J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Robert A. Young, #326594, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 4th day of January, 2018.



LaNelle Cantey DuRant
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 4th day of January, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 5, 2027.