

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2013-002379

STATE OF SOUTH CAROLINA,

Respondent,

v.

RONALD COULTER,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the lower court properly dismissed the Appellant's Petition for Writ of Habeas Corpus when the claims raised in the Petition did not warrant relief and the Appellant failed to carry his burden of proving any alleged violations which constituted a denial of fundamental fairness shocking to the universal sense of justice?

STATEMENT OF THE CASE

The Appellant is presently confined in the South Carolina Department of Corrections as the result of his kidnapping conviction and sentence. The Charleston County Grand Jury indicted the Appellant during the May 2002 term for kidnapping (2002-GS-10-2443), conspiracy to commit kidnapping (2002-GS-10-4454), and murder (2003-GS-10-4454). Rodney Davis, Esquire, represented the Appellant on these charges.

The Appellant proceeded to a jury trial with his co-defendant before the Honorable Deadra L. Jefferson, on February 23, 2004. Two days into trial, on February 25, 2004, the co-defendant agreed to enter a plea of guilty and testify for the State against the Appellant. On February 25, 2005, the Appellant also entered a negotiated guilty plea to kidnapping. The Appellant's other charges were *nolle prossed*. Judge Jefferson sentenced the Appellant to a negotiated sentence of thirty (30) years.

The Appellant did not appeal his conviction or sentence. However, he filed a *pro se* post-conviction relief (PCR) application (2004-CP-10-2999) on July 16, 2004. In his application he alleged claims regarding ineffective assistance of counsel, involuntary guilty plea, and a Brady violation. The State filed its Return on June 23, 2005. On May 26, 2006, the Appellant filed an amendment to his application. In his "Brief of Amended Issues", counsel for the Appellant raised additional claims of involuntary guilty plea.

On June 2, 2006, the Honorable William P. Keesley held an evidentiary hearing into the matter at the Charleston County Courthouse. The Appellant was present and represented by Lea B. Kerrison, Esquire. The Appellant testified on his own behalf, while the State presented the testimony of trial counsel Rodney Davis and Solicitor Scarlett Wilson.

On November 6, 2006, Judge Keesley filed an Order of Dismissal, in which he denied relief and dismissed the application with prejudice.

The Appellant timely served and filed a Notice of Appeal. Wanda Carter, Esquire, of the South Carolina Office of Appellate Defense represented the Appellant on appeal. On June 8, 2007, counsel for the Appellant filed a Johnson Petition for Writ of Certiorari on the Appellant's behalf. The Appellant filed a *pro se* response to the Johnson petition on July 12, 2007. The South Carolina Court of Appeals filed an Order on May 19, 2008 denying certiorari and granting counsel's petition to be relieved. The Remittitur was issued on June 4, 2008.

The Appellant subsequently filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina on August 22, 2008. The State filed a Return and Memorandum in Support of Summary Judgment on November 31, 2008. On August 3, 2009, the Honorable Paige J. Gossett issued a Report and Recommendation recommending the granting of the State's Motion for Summary Judgment. On September 16, 2009, the Honorable Patrick M. Duffy granted the State's Motion to Summary Judgment. The 4th Circuit Court of Appeals denied the Appellant's Motion for Appealability on July 28, 2011. The United State Supreme Court denied the Appellant's Petition for Writ of Certiorari.

The Appellant filed a Petition for Writ of Habeas Corpus with the Charleston County Clerk of Court on April 11, 2013 (2013-CP-10-2112). In his habeas petition, the Appellant raised two claims: 1. his post-conviction relief proceeding was not adjudicated in accordance with due process of law and 2. the appointment of ineffective post-conviction relief counsel constituted a denial of due process and fundamental fairness.

On August 9, 2013, the Honorable R. Markley Dennis Jr. convened a hearing on the Appellant's habeas petition. Upon information and belief, the Appellant was present at the

hearing. However, the State was not given notice of the scheduled hearing and no one was present at the hearing to represent the State. At the conclusion of the hearing, Judge Dennis dismissed the Appellant's petition. By way of findings, Judge Dennis stated:

"I have reviewed the documentation and very thorough brief that you submitted. It is apparent you're challenging the adequacy of your lawyer at the PCR proceeding...I do not believe that that is a subject matter for writ of habeas corpus....Your Motion is denied in full, based on the claims submitted. I am denying that on—I don't think that it can be properly heard under a habeas corpus proceeding." (Habeas Hearing Transcript p.1-3).

On August 22, 2013, Judge Dennis filed a form order denying the Appellant's Petition for Writ of Habeas Corpus. On September 13, 2013, the Appellant filed a Motion to Alter or Amend pursuant to Rule 59(e). By Order filed September 30, 2013, Judge Dennis denied the Appellant's Motion to Alter or Amend. This appeal follows.

ARGUMENT

The Appellant claims the lower court improperly dismissed his habeas petition when it characterized the Appellant's due process and 14th amendment violations as a claim regarding the effectiveness of post-conviction relief counsel. The Respondent submits the claims raised in the Appellant's habeas petition did not warrant habeas relief and the dismissal of the petition by the lower court was proper. "At common law, habeas relief was only available to a convicted defendant to attack the jurisdiction of the court imposing the sentence. However, during the 1950s and 1960s, South Carolina courts greatly expanded the use of the writ in order to ensure that our state afforded prisoners a proceeding where they could assert claims regarding constitutional violations." Williams v. Ozmint, 380 S.C. 473, 476, 671 S.E.2d 600, 601 (2008). "In 1969, South Carolina adopted our version of the Uniform Post-Conviction Relief Act, which drastically limited the availability of habeas corpus." Id.

The purpose of habeas corpus is to test the legality of the prisoner's present detention. McCall v. State, 247 S.C. 15, 145 S.E.2d 419 (1965). The only remedy that can be granted is release from custody. Id. A habeas corpus petition must support the requested relief. Hunter v. State, 316 S.C. 105, 447 S.E.2d 203 (1994). The person seeking relief by a writ of habeas corpus has the burden of sustaining the allegations of his petition by a preponderance of the evidence. Shelton v. State, 239 S.C. 535, 123 S.E.2d 867; Moore v. State, 241 S.C. 279, 128 S.E.2d 109. Habeas corpus is available only when other remedies are inadequate or unavailable. Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998).

A writ of habeas corpus will only be granted under "unique and compelling" circumstances. McWee v. State, 357 S.C. 403, 406, 593 S.E.2d 456, 457 (2004). Habeas relief is seldom used and acts as an ultimate ensurer of fundamental constitutional rights. Williams, 380

S.C. at 477, 671 S.E.2d at 602. For these reasons, a defendant bears a much higher burden in a habeas proceeding. Id. A writ of habeas corpus is reserved for the very gravest of constitutional violations “which, in the setting, constitute a denial of fundamental fairness shocking to the universal sense of justice.” Id. It is clear that not every intervening decision, nor every constitutional error at trial will justify the writ. Id.

A. The lower court properly dismissed the Appellant’s claim regarding the adjudication of his post-conviction relief proceeding because the claim is one that could have been raised during the appeal of the denial of post-conviction relief and could not be properly addressed through a habeas petition.

The Appellant claimed in his habeas petition that the PCR Court did not properly adjudicate his ineffective assistance of trial/plea counsel based on the standards outlined by the United States Supreme Court in Strickland v. Washington¹. The Respondent submits the dismissal of this claim by the lower court was proper. The Respondent submits the Appellant’s claim regarding the standard followed by the post-conviction relief court is an issue that should have been raised by the Appellant on appeal of the denial of his post-conviction relief application. Habeas corpus is available only when other remedies are inadequate or unavailable. Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998). Habeas corpus cannot be used as a substitute for appeal or other remedial procedure for the correction of errors for which a criminal defendant had an opportunity to avail himself. Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998)

After the resolution of the Appellant’s post-conviction relief matter, post-conviction relief counsel filed a timely Notice of Appeal on the Appellant’s behalf. Appellate counsel filed a Petition for Writ of Certiorari pursuant to Johnson v. State². The Appellant was given the opportunity to file a *pro se* response to the Johnson Petition. The Appellant’s *pro se* response

¹ 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

² 294 S.C. 310, 364 S.E.2d 201 (1988).

makes no mention of any claims regarding the procedure or standards used by the post-conviction relief court to adjudicate his post-conviction relief claims. The Respondent submits the Appellant should have raised the claim he now asserts in his habeas petition during his PCR appeal. The Appellant cannot now assert this challenge to the post-conviction relief court's findings in his habeas petition when this claim could have been properly pursued during the appeal of his PCR.

The Respondent also submits dismissal of this claim was proper since the record from the Appellant's post-conviction relief matter reflects this claim is wholly without merit. The PCR Court correctly applied the Strickland standard. The order dismissing the Appellant's application specifically cites Strickland v. Washington and the standards used to evaluate allegations of ineffective assistance of counsel. The Court's findings in the Order of Dismissal also reflect the application of Strickland by the Court. For each allegation, the Court makes finding regarding both deficiency and prejudice. (ROA pp. 867-872). The Appellant has failed to show that any alleged violation of his constitutional rights by the post-conviction relief court constituted a denial of fundamental fairness shocking to the universal sense of justice. This Court should affirm the lower court's dismissal of the Appellant's Petition for Writ of Habeas Corpus.

B. The lower court properly dismissed the Appellant's claim regarding the effectiveness of post-conviction relief counsel because the Appellant failed to carry his "high burden" of proving the representation he received from post-conviction relief counsel resulted in a denial of fundamental fairness shocking to the universal sense of justice.

The Appellant claims the lower court improperly mischaracterized the 14th amendment and due process constitutional claims he raised in his Petition for Writ of Habeas Corpus as a challenge to the effectiveness of his post-conviction relief counsel. In the petition, the Appellant claims, "[t]he State failed to provide the indigent petitioner with the type of assistance necessary to render the first-tier review of a sixth amendment right to effective counsel claim a

substantially equal and fair process.” (ROA p. 956). The Appellant’s habeas petition repeatedly references “the state-appointed [post-conviction relief] attorney’s failure to provide adequate representation for the indigent petitioner.” (ROA p. 956). The Respondent submits the lower court’s interpretation of this allegation as a claim challenging the effectiveness of post-conviction relief counsel was appropriate. However, if this claim is to be construed as purely constitutional as the Appellant claims in his brief, dismissal by the lower court as still proper.

The Respondent submits the “constitutional” claims the Appellant raised in his habeas petition could have been raised in a post-conviction relief application. “In a PCR proceeding, a defendant collaterally attacks his conviction and may raise any claims of constitutional violations relating to his conviction.” See S.C. Code Ann. §17-27-20(a) (2013). A matter which is cognizable under the [post-conviction relief] Act may not be raised by a Petition for a Writ of Habeas Corpus before the circuit or other lower courts. Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998).

The Respondent submits constitutional challenges are cognizable under the Post-Conviction Relief Act, therefore, if this claim regarding the effectiveness of post-conviction relief counsel is purely constitutional as the Appellant asserts, the lower court correctly dismissed the habeas petition on the basis that the claim was not proper for habeas relief.

The Respondent submits further the dismissal of the petition was proper since the Appellant’s claims regarding the representation of post-conviction relief counsel did not warrant habeas relief. The Respondent submits the Appellant had no constitutional right to counsel in his post-conviction relief matter. In Pennsylvania v. Finley, the United States Supreme Court held “we have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions.” 481 U.S. 551, 555, 107 S. Ct. 1990, 1993, 95 L. Ed. 2d

539 (1987). The right to appointed counsel extends to the first appeal of right, and no further. Id. The Supreme Court further opined that “since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.” Id. The Respondent submits the fact that the Appellant has no constitutional right to counsel for his post-conviction relief matter (a collateral proceeding) should preclude him from raising any constitutional challenges regarding the effectiveness of post-conviction relief counsel in a Petition for Writ of Habeas Corpus.

Lastly, the Respondent submits the Appellant’s petition failed to raise claims sufficient to warrant habeas relief. “A lack of effective assistance of counsel must be of such kind as to shock the conscience of the court and make the proceedings a farce and mockery of justice, and mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus.” Crosby v. State, 241 S.C. 40, 126 S.E.2d 843 (1962) (holding the Crosby’s Petition for Writ of Habeas Corpus was insufficient to alleged denial of due process based on alleged ineffective assistance of plea counsel).

In his petition, the Appellant states the following in support of his claim that representation by post-conviction relief counsel warranted the granting of habeas relief:

“It appeared from the PCR court’s preliminary ruling that Mr. Kerrison, though present in name, failed to assist the petitioner in complying with the State’s procedures and obtaining an adjudication on the merits of his Sixth Amendment ineffectiveness claims.” (ROA pp. 956- 957).

“Mr. Kerrison failed to demonstrate the thoroughness, preparation, and advocacy reasonably necessary to represent a defendant seeking relief from his criminal conviction under the federal constitution.” (ROA p. 957).

“Mr. Kerrison clearly misapprehended the jurisdiction of the PCR court under S.C. Code Ann. §17-27-30.” (ROA p. 958).

“Mr. Kerrison failed to advance any argument on behalf of the petitioner regarding the petitioner’s trial and plea counsel’s challenged conduct in terms of prevailing professional norms, which involves professional decisions based on informal legal choices.” (ROA p. 958).

The Respondent submits the Appellant’s claim of incompetency and insufficiency of PCR counsel does not warrant the issuance of a writ of habeas corpus. The facts as articulated by the Appellant in his petition do not reflect the “unique and compelling circumstances” which may warrant habeas relief. See McWee v. State, 357 S.C. 403, 406, 593 S.E.2d 456, 457 (2004). Nothing in the record reflects the allegations reviewed by the lower court were of the nature to “shock the conscience of the Court.” The Respondent submits the dismissal of the Appellant’s habeas petition was proper because the Appellant failed to carry his “high burden” of proving the representation he received from post-conviction relief counsel resulted in a denial of fundamental fairness shocking to the universal sense of justice. See Williams v. Ozmint, 380 S.C. 473, 477, 671 S.E.2d 600, 602 (2008). This Court should affirm the dismissal of the Appellant’s Petition for Writ of Habeas Corpus.

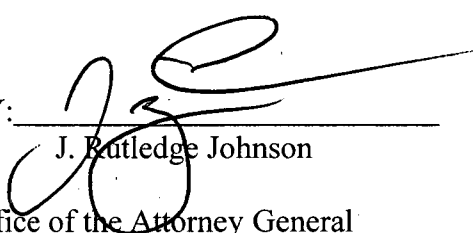
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Court should affirm the dismissal of the Appellant's Petition for Writ of Habeas Corpus.

Respectfully submitted,

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April 29, 2016

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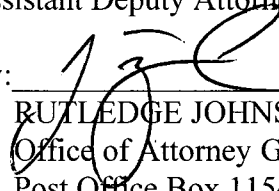
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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