

THE STATE OF SOUTH CAROLINA

In the Supreme Court

RECEIVED

DEC 19 2017

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

DEADRA L. JEFFERSON, Circuit Court Judge

Case No. 2017-002425

Respondent,

v.

Appellant.

REPLY BRIEF OF APPELLANT

Curtis Lemon^{TR} 256984

MacDougall C.I. B-2-D-2-B

1516 Old Gilliard Rd.

Ridgeville SC 29472

Pro se. Appellant.

Statement of the Case

Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston Clerk of Court. Applicant was indicted at the March 1998 term of the Charleston County Grand Jury for murder (1998-GS-10-1815); and Criminal Sexual Conduct, 1st degree (1998-GS-10-1814). I was represented by Juan W. Tolly, Esquire, and Melissa Gay, Esquire. On March 18, 1999, Applicant was convicted by a jury of voluntary manslaughter and criminal sexual conduct, 1st degree. He was sentenced by the Honorable Gerald C. Smoak, Jr., to confinement for a period of thirty (30) years on each charge, to be served concurrently.

A timely Notice of Appeal and Anders brief were filed on Applicant's behalf. On March 14, 2002, the Supreme Court of South Carolina denied Applicant's appeal in an unpublished opinion, *State v. Curtis Jerome Lemon*, No. 20-02-UP-032 (S.C. Ct. App. Filed April 5, 2002). The remittitur was issued on April 26, 2002.

Applicant subsequently filed an application for post-conviction relief on August 13, 2002. Respondent made its return on January 13, 2003. An evidentiary hearing into the matter was convened on June 16, 2004 at the Charleston County Court house before the Honorable Doyet A. Early, III. Applicant was present and represented by Bob J. Conley, Esquire. Adrienne L. Turner, Esquire of the S.C. Attorney General's Office represented the Respondent. Judge Early issued a written order denying and dismissing the application with prejudice dated September 7, 2004.

A timely Notice of Appeal was filed on Applicant's behalf. In an order dated October 30, 2007, the South Carolina Court of Appeals denied Applicant's petition for writ of certiorari. The Remittitur was issued on November 15, 2007.

Applicant filed a petition for Writ of Habeas Corpus in the Federal District Court of South Carolina on March 24, 2008. The State made its Return and Memorandum in Support of Summary Judgment on August 15, 2008. On January 23, 2009 the Honorable Bruce Howe Hendricks, United States Magistrate Judge, issued a Report and Recommendation, in which he recommended that the State's motion for summary judgment be granted and the habeas petition be dismissed with prejudice. In an order dated March 19, 2009, the Honorable R. Bryant Harwell, United States District Judge, granted the state's motion for summary judgment and denied Applicant's habeas petition with prejudice.

The Fourth Circuit Court denied a Certificate of Appealability and dismissed Applicant's appeal on October 6, 2009.

Application for DNA Testing

Applicant filed an application for Forensic DNA Testing on April 23, 2010, the state did not file applicant's application. In September of 2010 Applicant wrote to the State and inquired about the application. The State wrote applicant back and stated; "MR Lemon, we are not aware of any PCR DNA Test. We are just custodians of records. Is there something else you are requesting? You have already filed a PCR that has ended. On a document that's dated 10/1/2010. But later they sent me a copy of it. May 23, 2011 Applicant filed another application.

This application was sent Certified Mail, and the state sent it back to me with a PCRA application saying that "I filed it on the wrong form". Applicant sent it back to the state again Certified Mail with a note June 1, 2011 asking her to please file my Forensic DNA Testing application. The State filed applicant's application June 3, 2011. SEP. 22 2011, The Honorable Debra L. Jefferson appointed Michael A. Uricchio, as my counsel.

March of 2012 Applicant wrote to Mr. Uricchio said that, "You were appointed as my counsel 9-23-11, and it's March 2012 and I haven't heard from you. Applicant received a letter from Counsel March 14, 2012 stating; "This letter is to advise you that I have received your letter as well as paperwork from the court appointing me as your attorney. I have made arrangements with the Warden's Office to meet with you on Wednesday, March 21, 2012 at 10:00 am to discuss your case. I look forward to working with you.

In March of 2013 Applicant wrote the Palmetto Innocence Project for assistance with my case. March 7, 2013 they wrote me back and ^{said} "that I would not be eligible because I already have appointed Counsel for the DNA matter - Michael Uricchio. We strongly encourage you to contact Mr. Uricchio regarding the status of your case". So I wrote and my sister called him numerous times and he would not answer my letters or my sister's calls, until I wrote the Bar Association on him but he still did not write me back but he answered my sister's next call and told her that I was not going to trial.

Applicant wrote the clerk of court and inquired about my case. The State wrote me back 10/17/13 and said "Mr. Lemon, for warrant number F576997, the case has already ended. Please find enclosed the disposition for the charge. The State sent me a sentencing sheet that said I pled guilty.

NOV. 7, 2013 Applicant sent in an Amendment to: Application for Forensic DNA Testing, with a copy of my sentencing sheet.

NOV. 12, 2013 the State filed my amended application stating that; "Your request for your amended documents to be e-locked and filed with our office has been completed. Also, included are copies of your dispositions which have been corrected by our office. Your disposition now reads "Yr-ial Guilty" instead of "Plead Guilty."

June 24, 2014 Finally applicant went to a hearing in front of the Honorable Roger M. Young, Sr. White in the booth with my counsel ^{he} said to me that "this is the last draw" and I said no it's not we can appeal. Counsel said yes. He handed me three pieces of paper that he got from the State and told the judge that there was no semen found. That was the extent of his representation.

17-28-20.(1)

"Biological material" means any blood, tissue, hair, saliva, bone, or semen from which DNA marker groupings may be obtained. This includes material catalogued separately on slides, swabs, or test tubes or present on other evidence including, but not limited to, clothing.

ligatures, bedding, other household material, drinking cups, or cigarettes.

The Crime scene supplementary report evidence list sent eighteen (18) piece of evidence to sled.

The Honorable Roger M. Young, Sr. ordered that applicant's application for Forensic DNA be Denied. It is Further Ordered that Michael Uricchio is relieved as counsel for Mr. Lemon the same day of my hearing. June 24, 2014. Applicant Filed a Pro se ^Notice of Appeal. In an order Filed November 24, 2014, the South Carolina Court of Appeals dismissed the appeal pursuant to Rule 207 of the South Carolina Appellate Court Rules, for failure to provide the Court with the transcript of the proceeding. The Remittitur was issued on January 28, 2015.

October 20, 2014 the Court of Appeals wrote Mr. Uricchio and inform him about my appeal and the deficiencies it has, and that he had ten (10) days to correct it or the appeal will be dismissed. Also that "Pursuant to Rule 264, SCACR, you remain counsel of record until withdrawal is approved by order of the Court.

RULE 264. SUBSTITUTION OF ATTORNEYS OR GUARDIANS
(a) Continued Representation. The attorneys and/or guardians ad litem of the respective parties in the court bellow shall be dee-

med the attorneys and guardians of the same parties in the appellate court until withdrawal is approved and notice is given as provided in this Rule.

(b) *Withdrawal.* An attorney of record in a matter pending before an appellate court may not withdraw from representation of his client without justifiable cause, or the consent of his client; and then only after proper written notice to his client, on petition to and by written order of the appellate court, and with notice to the adverse party.

("Judge Young did not have the authority to relieve Uricchio as counsel")

Applicant filed^a post-conviction relief application on March 13, 2015. Ineffective assistance of counsel applicant raised two claims.

Failure to protect my rights pursuant to S.C. Code Ann. 17-27-100; Right to seek appellate review of the denial of my application for Forensic DNA Testing PCR.

The State sends it back to me with a letter dated 4/1/15 stating; ("Enclosed is a copy of your filed PCR I just realized you are missing pages 2 & 4. Just a suggestion, you may want to file an

amended PCR application which I have enclosed, This will ensure there is no missing information.") Applicant filed the amended application on APR. 13, 2015. A Conditional Order was issued on August 27, 2015. To the Honorable R. Markley Dennis, Jr. A Final order of dismissal was issued on April 11, 2016. To the Honorable Roger M. Young, Sr. the same judge that turned down my application for Forensic DNA Testing, And relieved Uricchio as my counsel. Judge Young should have disqualified himself from the final order.

28 U.S.C.A. § 455. Disqualification of justice, judge, or magistrate.

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(1) (Where he has a personal bias or prejudice concerning a party, or personal knowledge of the disputed evidentiary facts concerning the proceeding...) 28 U.S.C.A. § 455 (a), (b) (2). bias § 194.

See Taylor v. O'Grady, C.A. 7 (Ill.) 1989, 888 F.2d 1189.

Recusal under statute governing disqualification of judge is self executing; party need not file affidavits in support of recusal, and judge is obligated to recuse herself sua sponte under stated circumstances.

Applicant appealed judge Young's decision to the Supreme Court of South Carolina, the Supreme Court denied Applicant's appeal. the remittitur was issued on July 01, 2016.

Applicant Filed a second PCR Application; 2016-CP-10-5738
In this application applicant raises the following claim(s):

- 1). Ineffective Assistance of PCR Counsel for failing to appeal DNA Testing.
- 2). Denial of Procedural Due Process and the right to Appellate review from the denial of his PCR Forensic DNA Testing.
- 3). Violation of § 17-27-90, § 17-27-100, Sup. Ct. Rule 50(a), U.S.C.A. Const. Amend. 6, SCRC PROC. 71.1 (g).

LEGAL

§ 17-28-10. Citation of Article.

This article may be cited as the 'Access to Justice Post-Conviction DNA Testing Act'.

History: 2008 Act No. 413, § 1, eff January 1, 2009.

§ 17-28-30. Offenses for which post-conviction DNA testing available.

(A) A person who pled not guilty to at least one of the following offenses, was subsequently convicted of or adjudicated delinquent for the

offenses, 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 biological material related to his conviction or adjudication:

(1) murder (Section 16-3-10);

(10) criminal sexual conduct in the first degree (Section 16-3-652);

§ 17-28-110. Consent to testing.

(A) Nothing in this article prohibits a person and or solicitor or the Attorney General, as applicable, from consenting to and conducting post-conviction DNA testing by agreement of the parties. The person may use the exculpatory results of the DNA test as the grounds for filing a motion for new trial pursuant to the South Carolina Rules of Criminal Procedure.

Facts and Legal Authority

The applicant will respectfully show this Honorable Court the following specific reasons, factual and legal, why it should not dismiss this matter.

Statute of Limitations

Applicant filed an Application For Forensic DNA Testing Act on November 12, 2013. A hearing was convened on June 24, 2014. The Honorable Roger

Young, Sr. denied the application in an Order dated June 24, 2014.

Applicant filed a Pro se appeal from the denial of the Application for DNA Testing. The South Carolina Court of Appeals dismissed the appeal, the remittitur was issued on January 28, 2015. Applicant then filed his first Post-Conviction Relief on March 13, 2015, and the amended one on April 8, 2015. Judge Young denied applicant application on April 11, 2016. Applicant appealed to the Supreme Court of South Carolina, June 14, 2016 they dismissed applicant's appeal and the remittitur was sent July 1, 2016. Applicant filed his second Post-Conviction Relief application October 25, 2016, three months after he received the remittitur from the Supreme Court.

S.C. Code. Ann. § 17-27-10 to § 17-27-160 the Act provides:

An application for relief filed pursuant to this Chapter must be filed within one year after the entry of a judgment of offense or within one year after the sending of the remitter to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

Successive

Hughes v. State April 13, 2016 Not Reported in S.E. 2d 2016 WL 1452673
State's OUR courts have "allowed successive PCR applications where the applicant has been denied complete access to the appellate process" O'Don, 337 S.C. at 261, 523 S.E.2d at 755. "The right to seek appellate review of the denial of PCR is expressly authorized by state law."

Austin v. State, 305 S.C. 453, 454, 409 S.E. 2d 395, 396 (1991) (citing S.C. Code Ann. § 17-27-100 (1985)). "A PCR applicant is entitled to an Austin appeal if the PCR (court) affirmatively finds either (1) the applicant requested and was denied an opportunity to seek appellate review, or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. *Odom*, 337 S.C. at 262, 523 S.E. 2d at 756.

Aice v. State, 409 S.E. 2d 392 (S.C. 1991), submitted in conjunction with this opinion, wherein we hold that once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications, based on ineffective assistance of prior PCR counsel. *Aice* also states that finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. That at some juncture judicial review must stop, with only the very rarest of exception, when the ^{system} has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice.

Res Judicata

There are numerous exceptions to the application of *res judicata* and collateral estoppel. In *Pye*, this court adopted the restatement (second) of judgments section 28, which states: (5)(c) Because the party sought to be precluded, as a result of the conduct of his adversary or

Other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.
Pye, 325 S.C. at 437-38, 480 S.E.2d at 460-61

Catawba Indian Nation v. State 407 S.C. 526 756 S.E.2d 900

II 538 Res judicata may be applied if (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was prior adjudication of the issue by a court of competent jurisdiction.

Johnson v. Greenwood Mills, Inc, 317 S.C. 248, 250-51, 452 S.E.2d 832, 833 (1994). The doctrine of res judicata is not an "iron clad bar." Judy, 393 S.C. at 167 712 S.E.2d at 412.

Liberty Mut. Ins. v. Employers Ins. of Wausau S.C. 325 S.E.2d 566.
Res judicata bars relitigation of the same cause of action.

Applicant's first PCR applicant was seeking a new trial, in his second PCR an evidentiary hearing.

Pursuant to title § 17-28-60, Post-Conviction DNA Testing and preservation Act. § 17-28-60. Cost and expenses; appointment of counsel for indigent applicant. If the applicant is unable to pay court cost and expenses, these cost and expenses shall be made available to the applicant in the am-

ount and to the extent provided pursuant to section 17-27-60. The applicant must request counsel at the time he files his application. The court must appoint counsel for an indigent applicant after the court has determined that the application is sufficient to proceed to a hearing, but prior to the actual hearing. If counsel has been appointed for the applicant in an ongoing post-conviction relief proceeding, then the counsel appointed in the post-conviction relief hearing shall also serve as counsel for the purposes of this article

See also § 17-28-90 (G); holding that: The Applicant and the Solicitor or Attorney General, as applicable, shall have the right to appeal a final order denying or granting DNA Testing by a writ of certiorari to the Court of Appeals or the Supreme Court as provided by the S.C. Appellate Court Rules.

Appellate Court Rule-247 Certiorari to review DNA Testing Decisions

(a). Review by writ of certiorari. A final order of the Circuit or Family Court denying or granting DNA testing under the Access to Justice Post-conviction DNA Testing Act (S.C. Code Ann. § 17-28-10 to -120) shall be reviewed upon petition of either party for a writ of certiorari according to the procedure set forth in this rule.

The South Carolina Court of Appeals dismissed Applicant's Pro se Notice of Appeal on November 24, 2014, pursuant to South Carolina Appellate Court Rules 207 for failure to provide the court with the transcript of the proceeding.

See Bray v. State, 366 S.C. 137, 620 S.E. 2d 743, in which the court held that: A defendant has a right to seek appellate counsel's assistance in seeking review of the denial of post-conviction relief. Counsel on appeal from denial of post-conviction relief is required to brief arguable issues, despite counsel's belief that appeal is frivolous, to safeguard the right to appeal.

Rule of Civ. Proc. Rule 71.1(g). Counsel is also required to advise a defendant of his right to appellate review of the denial of post-conviction relief; abrogating Sutton v. State, 361 S.C. 644, 606 S.E. 2d 799. See also; Austin v. State, 305 S.C. 409 S.E. 2d 395 (1991), the South Carolina Supreme court held that an applicant has a right to an appellate's counsel's assistance in seeking review of the denial of PCR. Johnson v. State, 294 S.C. 310, 364 S.E. 2d 201 (1988). Further, Rule 71.1(g), SCRPC, expressly provides that if the applicant wishes to seek appellate review, PCR counsel must file a Notice of Appeal, continue representing the applicant until an indigent applicant obtains representation by the Office of Appellate Defense.

See also Odom v. State, 337 S.C. 256, 523 S.E. 2d 753 (S.C. 1999) which held Pro se petitioner for post-conviction relief was entitled to evidentiary hearing on issue of whether he knowingly and intelligently waived his right to appellate counsel after his first Pro se application for post conviction relief was summarily dismissed and one-year statute of limitations does not apply to petitioner's appeal from summary denial of application for post-conviction relief based on denial of right to appeal. Hope v. State, 328 S.C. 78, 492 S.E. 2d 76 n.1 (1977).

Applicant argues that trial counsel was ineffective by failing to file an appeal and to perfect his appeal after the court of appeals wrote and inform him about the deficiencies in applicant's improperly filed Notice of Appeal. And also advising counsel that pursuant to Rule 264, SCACR, that he remained counsel of record until withdrawal was approved by the court of appeals. Counsel made no attempt to contact the court or remedy the deficiencies in applicant's improperly filed Notice of Appeal. The deficiencies were noticed and brought to counsel's attention via letter dated October 20, 2014. The South Carolina Court of Appeals dismissed applicant's appeal do to the deficiencies along with failure to provide the court with a transcript. Had counsel adhere to the court's letter providing the court with the requested documents, applicant would not have been deprived of his right to seek Appellate Review from the denial of his application for Forensic DNA Testing. What the applicant places emphasis on here,

is that he never waived his right to continue challenging his conviction. Applicant is entitled to an evidentiary hearing to determine if he in fact, requested and was denied his right to appellate review by DNA's Counsel Failure to timely file a Notice of appeal. In Austin v. State, 305 S.C. 453 S.E. 2d 395 (1991); King v. State, 417 S.E. 2d 868 S.C. 1992. (held that specific procedures would be followed in all future cases where review of denial of post-conviction relief application was sought based on defendant's alleged failure to properly waive right to appellate review of prior denial).

CONCLUSION

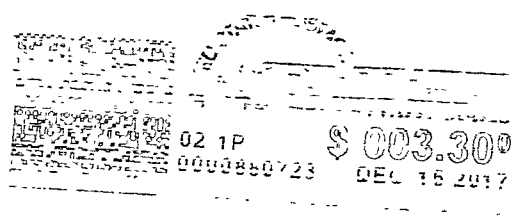
Based on the following facts and legal authority presented in Applicant's application, he is entitled to a hearing to determine whether he knowingly, intelligently, and voluntarily waived his right to appellate review from the denial of his PCR Forensic DNA Testing Application.

Respectfully Submitted

Curtis Lemon

Curtis Lemon

Curtis Lemon #256984
MacDougall C.I B-2-D-2-B
1516 Old Gilliard Road
Ridgeville SC 29472



RECEIVED

DEC 19 2017

S.C. SUPREME COURT

The Supreme Court of South Carolina
Daniel E. Shearouse, Clerk of Court
Post Office Box 11330
Columbia, South Carolina 29211