

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lee County
Jocelyn Newman, Circuit Court Judge

2015-CP-31-121
Appellate Case No. 2017-000063

RECEIVED

APR 10 2018

S.C. SUPREME COURT

ERNEST TONEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUES PRESENTED

- I. Did the PCR court properly dismiss Petitioner's application for post-conviction relief where it was filed nearly a year and a half after the statute of limitations had run?

- II. Did the PCR court correctly granted Petitioner a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), where the state consented to the request and the undisputed evidence showed that although Petitioner requested an appeal, Trial Counsel failed to file the notice of appeal as requested?

STATEMENT OF THE CASE

Ernest Toney (“Petitioner”) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lee County Clerk of Court. His conviction arose from an incident occurring on September 12, 2010, when Petitioner shot and killed the victim on the side of the highway after the victim. Petitioner had a hostile history with the victim, and during the incident, the victim yelled at Petitioner and pulled a long gun out of his car. App. 504. In response, Petitioner, who was standing outside his car, returned to his car, retrieved an 8 millimeter rifle, and fired a single gunshot at the victim. When the victim fell to the ground, Petitioner jumped in his vehicle, and went to his mother’s house for fifteen or twenty minutes before going to a lounge and buying two beers, and then to a gas station to buy chips and a coke. App. 504-505.

In September 2011, the Lee County Grand Jury indicted Petitioner for murder (2011-GS-31-0156). Shaun Courtney Kent, Esquire, represented Petitioner. Assistant Solicitor Paul M. Fata, Esquire, prosecuted the case. On December 14, 2012, Petitioner proceeded to trial before the Honorable George C. James, Jr., and a jury. The jury found Petitioner guilty as indicted. Judge James sentenced Petitioner to forty years’ imprisonment. Petitioner did not appeal his conviction or sentence.

Petitioner filed his application for post-conviction relief on May 8, 2015, alleging he was being held unconstitutionally based on the following allegations:

1. “Applicant was denied the right to effective assistance of counsel”
 - a. “Counsel failed to investigate, develop (sic), and present all available, relevant and admissible evidence”
 - b. “Counsel failed to present expert witnesses i.e. handwriting-expert to expose a fraudulent signature on a fraudulent statement”

- c. “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.”
- d. “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

Respondent made its Return and Motion to Dismiss All Claims But White v. State on July 9, 2015. An evidentiary hearing was held on July 26, 2016, at the Sumter County Courthouse. Petitioner was present and represented by Lance S. Boozer, Esquire. Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office represented Respondent. 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. The PCR court granted the motion and proceeded solely on the claim of relief under White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). After presenting testimony from Trial Counsel, Respondent consented to the granting of this relief.

The PCR court issued an order signed August 9, 2016, and filed August 25, 2016, dismissing the application and granting a belated review of direct appeal issues pursuant to White. Petitioner was served with written notice of the order on January 11, 2017, and filed a timely notice of appeal on January 12, 2017. Petitioner filed his Petition for Writ of Certiorari, Brief of Petitioner Pursuant to White v. State, and Appendix on November 20, 2017. This Return to Petition for Writ of Certiorari follows.

ARGUMENT

I. The PCR court properly dismissed Petitioner's application for post-conviction relief where it was filed nearly a year and a half after the statute of limitations had run.

Petitioner asserts the PCR court erred in dismissing his claims of ineffective assistance of counsel, which were filed after the statute of limitations passed, because Trial Counsel waited nearly twenty-seven months to inform Petitioner that he had not filed a notice of appeal in his case, so the statute of limitations should be equitably tolled due to extraordinary circumstances outside his control. However, equitable tolling has not been allowed in this circumstance, and this Court should reject Petitioner's invitation to extend equitable tolling. Accordingly, this Court should affirm the dismissal of Petitioner's claims as untimely filed.

The statute of limitations for filing an application for PCR is one year. Section 17-27-45(A) of the South Carolina Code provides:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Our courts have held that "statutes of limitations are not simply technicalities, but are fundamental to a well-ordered judicial system." Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). Moates explained:

Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.

Id. Statutes of limitations should be followed as strict rules in order to set a hard deadline to ensure an organized legal system.

In rare circumstances, the statute of limitations will be equitably tolled to allow a petitioner the opportunity to exercise his or her rights when they were denied the chance to do so. This doctrine has been specifically extended into the context of post-conviction relief cases, as well. Equitable tolling has been deemed available where (1) extraordinary circumstances prevented the plaintiff from filing despite his due diligence; (2) the plaintiff 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; and (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim. Pelzer v. State, 378 S.C. 516, 521, 662 S.E.2d 618, 619-20 (Ct. App. 2008). Pelzer explains that the court typically applies the extraordinary circumstances doctrine when the plaintiff has been actively misled by another party. "It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights." Id. However, the equitable tolling doctrine does not require wrongful conduct on the part of the State, such as fraud or misrepresentation. Id.

Pelzer explained the doctrine should be limited to very exclusive circumstances. "[E]quitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine." Pelzer, 378 S.C.

at 521, 662 S.E.2d at 620. Pelzer cited to an opinion from the Fourth Circuit Court of Appeals in denying equitable tolling to a party as “particularly illuminating:”

[A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that any resort to equity must be reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result.

Pelzer, at 378 S.C. 522-23, 662 S.E.2d at 621 (citing Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir.2000) (holding habeas petitioner's missing filing deadline due to erroneous advice from counsel not extraordinary circumstance requiring equitable tolling)).

In Pelzer, a post-conviction relief applicant notarized and mailed his application before the statute of limitations expired, but mailed it to the Office of Appellate Defense instead of to the county Clerk of Court for filing. 378 S.C. at 518, 662 S.E.2d at 619. The Office of Appellate Defense forwarded it to the Clerk, but it was not received by the Clerk until after the statute of limitations had expired. Id. at 518-19, 662 S.E.2d at 619. The circuit court dismissed the application as untimely. The Court of Appeals affirmed, finding that mailing did not constitute filing and “the narrow window by which Pelzer's application missed the statute of limitations [could not] be considered as so exceptional a circumstance as to warrant equitable tolling.” Id. at 522, 662 S.E.2d at 621.

This Court has also chosen not to extend the doctrine of equitable tolling to situations where the applicant claimed he was ignorant of the statute of limitations because he was incarcerated in another state. Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005) (holding incarceration in another state does not toll the running of the statute of limitations). Leamon

explained the applicant had a full year to submit a post-conviction petition, and ignorance of the statute of limitations is not an excuse for late filing. Id., 363 S.C. at 435, 611 S.E.2d at 496.

This Court has held that the statute of limitations should be equitably tolled for the filing of a post-conviction relief application in limited circumstances. See Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009) (finding the statute of limitations should be equitably tolled when a mentally incompetent PCR applicant was prevented from timely filing by his mental incompetency, and the applicant should proceed with his PCR action only if the application was filed within one year of the applicant regaining competency); Mose v. State, 420 S.C. 500, 803 S.E.2d 718 (2017) (allowing equitable tolling where the applicant notarized and relinquished control of his application to prison authorities for mailing seventeen days prior to the filing deadline, but due to circumstances outside applicant's control, the application was not filed until three days past the deadline). Equitable tolling has also been allowed where "extraordinary circumstances prevented the plaintiff from filing despite his or her diligence" and where "the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim." Pelzer, 378 S.C. at 521, 662 S.E.2d at 621.

However, the facts of the present case do not align with any of these circumstances where this Court has extended the doctrine of equitable tolling. Here, Petitioner claims that, despite his due diligence, he was prevented from filing a timely post-conviction relief application by Trial Counsel's failure to inform him that his direct appeal was never filed. Although Petitioner asserts in his petition that he "actively and diligently pursued his right to a direct appeal by speaking to Trial Counsel on several occasions about the direct appeal," PWC at 11, there is no evidence in the record that Petitioner diligently followed up on the status of his appeal. Although Trial Counsel testified that he spoke with Petitioner several times about filing an appeal, he could not

specifically recall when Petitioner asked him to file an appeal, and there is no testimony about Petitioner following up on the status of his appeal after he believed it was filed. App. 764, line 13-19.

Petitioner argues in his application and his petition that he was “patiently waiting” for his direct appeal to be decided before filing his PCR application. It is unreasonable for Petitioner to wait for twenty-seven months without taking any action to follow up to see if his appeal is still pending. If Petitioner had diligently followed up to obtain information on his direct appeal, he would have become aware much sooner that it had never been filed and could have filed his PCR application within the one-year statute of limitations. Instead, Petitioner claims he was not aware that his direct appeal was never filed until Trial Counsel brought it to his attention more than two years later. See App. 750. This was not diligence to obtain information on his claim, as required to be entitled to equitable tolling of the statute of limitations.

Although Petitioner asks this Court to extend the doctrine of equitable tolling to a circumstance where trial counsel fails to inform the applicant his direct appeal was not filed, there is no case law supporting such an extension. Petitioner has failed to show his circumstances are such that are extraordinary and out of his control that should warrant an extension of the equitable tolling doctrine.

Therefore, because Petitioner has failed to prove extraordinary circumstances prevented him from timely filing his PCR application despite his due diligence, he has not proven he is entitled to equitable tolling of the statute of limitations, and this Court should decline to extend the doctrine of equitable tolling of the statute of limitations to his circumstance. Accordingly, this Court should affirm the PCR court’s dismissal of Petitioner’s claims of ineffective assistance of counsel as untimely filed.

II. The PCR court correctly granted Petitioner a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), where the state consented to the request and the undisputed evidence showed that although Petitioner requested an appeal, Trial Counsel failed to file the notice of appeal as requested.

Respondent agrees with Petitioner's assertion that he is entitled to a belated review of direct appeal issues. It is clear from the record Trial Counsel did not file a notice of appeal despite Petitioner's wish for him to do so. Respondent consented to the granting of this relief and does not oppose it on appeal.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By: 
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April 10, 2018

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STATE OF SOUTH CAROLINA
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Certiorari to Lee County

S.C. SUPREME COURT

The Honorable Jocelyn Newman, Circuit Court Judge

ERNEST TONEY,

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STATE OF SOUTH CAROLINA

Respondent.

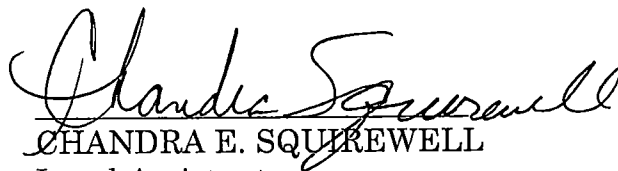
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tristan M. Shaffer
Post Office Box 1161
Irmo, South Carolina 29063

I further certify that all parties required by Rule to be served have been served.

This 10th day of April, 2018.


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APR 10 2018
S.C. SUPREME COURT

April 10, 2018

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

RE: Ernest Toney, v. State of South Carolina
2017-000063

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari and the original and fourteen (14) copies of the Brief of Respondent pursuant to White v. State on the above case.

Sincerely,

Julie A. Coleman
Assistant Attorney General

JAC/ces
Enclosures

cc: Tristan M. Shaffer, Esquire