

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Honorable Jocelyn J. Newman, Circuit Court Judge

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APR 30 2018
S.C. SUPREME COURT

ROBIN GREY REESE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001110

PETITIONER'S RETURN TO MOTION FOR
REMAND FOR SPECIFIC FINDINGS OF FACT
AND CONCLUSIONS OF LAW
PURSUANT TO S.C. CODE
SECTION 17-27-80

In response to Respondent's Motion to Remand, Petitioner submits the following:

Petitioner was indicted for lynching in the first degree and murder. Following a jury trial in 2012, Petitioner was found guilty of both offenses and sentences to thirty years' incarceration. Petitioner's convictions and sentences were affirmed. State v. Reese, Op. No. 2014-UP-300 (S.C. Ct. App. filed July 30, 2014).

Petitioner then filed a timely application for post-conviction relief. An evidentiary hearing was held on August 30, 2016 before the Honorable Jocelyn J. Newman. After asking for proposed orders, Judge Newman signed the State's proposed order which denied Petitioner

relief. Following the issuance of the Order of Dismissal, PCR counsel for Petitioner filed a motion in accordance with Rule 59(e), SCRCP, arguing that the Order of Dismissal did not “contain specific findings of fact and conclusions of law regarding each of the claims presented at the evidentiary hearing, as required by S.C. Code Ann. § 17-27-80” and that the summary of testimony was “not an objective, true, and accurate recitation of the testimony presented during the evidentiary hearing.” The State filed its Return on or about December 14, 2016, taking the position that “the Order of Dismissal contains the appropriate findings of fact and conclusions of law.”

Following the filing of a Notice of Appeal, a Petition for Writ of Certiorari was filed on December 27, 2017. It entailed three issues in addition to the one referenced by Respondent in its Motion. On April 20, 2018, the State filed a “Motion for Remand for Specific Findings of Fact and Conclusions of Law Pursuant to S.C. Code Section 17-27-80.” This Return follows.

ARGUMENT

In ruling on an application for post-conviction relief, “[t]he [PCR] court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.” S.C. Code Ann. § 17-27-80. The PCR court’s general denial of all claims not specifically addressed in the PCR court’s order “does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law.” Marlar v. State, 375 S.C. 407, 409, 653 S.E.2d 266, 266 (2007).

In Marlar, this Court held that the following language from a PCR judge’s order did not “constitute a sufficient ruling on any issues since it [did] not set forth specific findings of fact and conclusions of law” as required by S.C. Code Ann. § 17-27-80:

As to any allegations raised in the application or at the hearing not specifically addressed by this Order, this Court finds that the applicant failed to present any

evidence regarding such allegations. Accordingly, this Court finds that the applicant failed to meet his burden of proof regarding them. Therefore, any and all allegations not specifically addressed in this Order are hereby denied and dismissed.

Id. at 409, 653 S.E.2d at 266. Furthermore, this Court instructed that such language “should not be included in a PCR order unless there are allegations contained in the application and/or mentioned at the PCR hearing about which absolutely no evidence is presented.” Id. at 409, 653 S.E.2d at 266-7. Unlike in Marlar, however, Petitioner in the matter *sub judice* filed a Rule 59(e) motion which preserved this claim.

In Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127, this Court found it necessary to vacate a PCR judge’s order and remanded for a new for a new hearing:

Unfortunately, although these allegations were raised in petitioner’s application for PCR and evidence was presented regarding them at the hearing on the application, [the PCR judge’s] order denying relief does not address the questions. Accordingly, we find it necessary to vacate [the PCR judge’s] order and **remand this matter to the circuit court to hold a new hearing**. Petitioner shall be entitled to file an amended application if necessary and the order shall address all issues properly raised at the hearing.

Id. at 255, 423 S.E.2d at 128 (citing McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991)) (footnote omitted) (emphasis added). This Court then addressed such deficient orders, generally:

We take this opportunity to express our concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant. Not only does this deprive the parties of rulings on the issues raised, but it makes review by the appellate court more difficult and ultimately increases the work load of all involved, where, as in this case, a new hearing is required to secure the rulings which should have been made initially.

Id. at 255-6, 423 S.E.2d 128.

In McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991), this Court reversed a PCR order denying McCray relief and remanded for a new PCR hearing:

The PCR court dismissed McCray's allegations of ineffective assistance of counsel without making findings of fact on the specific allegations raised.

S.C. Code Ann. § 17-27-80 (1976) requires the PCR court to 'make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.'

The PCR court's conclusions regarding ineffective assistance **are insufficient for appellate review and fail to meet the standard set forth in the statute.**

Id. at 330, S.E.2d at 241. Accordingly, this Court "reverse[d] the order denying McCray relief and remand[ed] for a new PCR hearing." Id.

In McCullough v. State, 320 S.C. 270, 464 S.E.2d 340 (1995), this Court remanded a matter to the circuit court to issue an order addressing a decision to dismiss a successive PCR application:

The PCR judge signed an order prepared by the Attorney General's Office. However, the order failed to address the judge's decision to dismiss McCullough's second application as successive. Instead, the order addressed issues which were decided at the first PCR hearing, but were *not* presented to or ruled upon by the second PCR judge.

Id. at 271-2, 464 S.E.2d at 341. (emphasis in original). Citing S.C. Code Ann. § 17-27-80, Pruitt, supra, and McCray, supra (both of which provided for a new hearing following remand) this Court remanded for issuance of an order. Unlike McCullough, Petitioner Reese's matter was not dismissed on procedural grounds; she was not denied relief simply because she filed a successive PCR application.

In Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016), this Court remanded a PCR matter for the issuance of a proper order. This Court declined to rule on the merits, where doing so "would be unfair to the State, which would be deprived of the opportunity to have this matter fully resolved by a proper order from the PCR court." Id. at 593, 788 S.E.2d at 225. Based upon the State's assertion that "it should not be foreclosed from the panoply of arguments available to

it, especially related to the prejudice prong in the PCR analysis and the strength of Petitioner's confession to the crimes," this Court declared that a remand was in the best interests of justice.

Id.

Recently, the United States Supreme Court also considered the wholesale adoption of proposed orders in capital cases. The High Court explained this practice raised serious questions about the fairness of the process and the trial court's factual findings. Jefferson v. Upton, 560 U.S. 284, 293-294 (2010). In Jefferson, the state submitted a proposed order ex parte. The PCR court adopted the proposed order verbatim. Id. at 292. The Supreme Court explained that the practice of trial courts of adopting the proposed orders of one side had been criticized for decades. Id. at 293-294 (stating "Although we have stated that a court's 'verbatim adoption of findings of fact prepared by the prevailing parties' should be treated as findings of the court, we have also criticized that practice.")(quoting Anderson v. Bessemer City, 470 U.S. 564, 572 (1985)). The Supreme Court remanded the case for a determination of whether the state court's factual findings warranted a presumption of correctness in light of the state PCR court's adoption of the ex parte proposed order as its final order disposing of Jefferson's claims. Id. at 293-294. In a companion case decided during the same term as Jefferson, the Supreme Court explained that a state PCR court must engage in a "probing and fact-specific analysis" in capital cases. Sears v. Upton, 561 U.S. 945, 130 S.Ct. 3259, 3266 (2010). In light of this requirement concerning how the state PCR court must review capital cases, it is no surprise that wholesale adoption of one side's proposed order falls far short of demonstrating a trial or PCR judge engaged in an independent probing and fact-specific analysis of a capital defendant's claims.

At the outset, Petitioner opposes Respondent's motion to remand for the issuance of an amended order. Multiple issues have already been briefed, and the State has already taken a position regarding the sufficiency of the Order of Dismissal.

In response to Petitioner's Rule 59(e) motion, the State filed a return with the following response: "Respondent submits **that the Order of Dismissal contains the appropriate findings of fact and conclusions of law** as required by S.C. Code Ann. § 17-27-80 (1976), and Rule 52(a) SCRPC. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991)." App. 1367 (emphasis added). As argued in the Petition for Writ of Certiorari, "[t]his should further preclude the State from arguing that a more specific order is necessary to protect its rights and interests, as such would be contrary to its argument to the PCR court." Pet. 10. Petitioner does not distinguish between attorneys representing Respondent; a change in counsel does not justify a complete about-face. If the Order of Dismissal did not contain the proper findings of fact and conclusions of law at the time of filing, that should have been remedied before this matter was appealed. What has transpired in the meantime but the filing of a Petition? Only after the insufficient nature of the Order was exhumed a second time did Respondent modify its position.

Petitioner's sentence began on February 28, 2012. The Order of Dismissal that is the subject of this appeal was filed on November 14, 2016. The State has already had the opportunity to respond to the allegation that this Order is deficient. Instead of doing just that, the State took the opposite stance in its Return to the Rule 59(e) motion dated December 14, 2016: that this Order "contains the appropriate findings of fact and conclusion of law."¹

¹ Judicial estoppel may apply in this situation. According to this Court, the following elements are necessary for the doctrine to apply:

- (1) two inconsistent positions taken by the same party or parties in privity with one another;
- (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other;
- (3) the party taking

To the extent that Petitioner requested a remand in the Petition, it was described as alternative relief. To allow Respondent the potential to draft an Order of Dismissal a second time, following the submission of three meritorious issues in the form of a Petition for Writ of Certiorari would be a contravention of justice. Much like Petitioner only being entitled to “one bite at the apple” under Odom v. State, 337, S.C. 256, 523 S.E.2d 732 (1999), the State should not be allowed the opportunity to craft a new Order of Dismissal in response to the issues raised by Petitioner.

A remedy in the form of a new order would allow the State to utilize the Petition for Writ of Certiorari to shape the order. In the event that this Court grants a remand, the remand should be for a new PCR hearing. Petitioner should be provided the opportunity for a new hearing where the PCR court can receive new evidence and hear additional argument from counsel. The final order as it currently exists is the product of the State’s view of the facts and its cherry-picked citation of authority.

To remedy this error, this Court should remand for a new PCR hearing. The Court should not apply the deferential “any evidence” standard normally used in PCR cases because the factual findings and analysis in the final order are not the product of an independent review of the facts presented and an application of the governing case law to those facts. Therefore, Petitioner respectfully requests this Court to review the evidence or remand for a new PCR hearing.

the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Cothran v. Brown, 357 S.C. 210, 215-6, 592 S.E.2d 629, 632 (2004).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Taylor D. Gilliam", written over a horizontal line.

TAYLOR D. GILLIAM
Appellate Defender

LAURA R. BAER
Appellate Defender

ATTORNEYS FOR RESPONDENT

This 30th day of April, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Honorable Jocelyn J. Newman, Circuit Court Judge

ROBIN GRAY REESE,

PETITIONER,

V.

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RESPONDENT

CERTIFICATE OF SERVICE

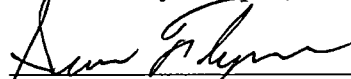
I certify that a copy of the Return to Respondent's Motion for Remand for Specific Finding of Fact and Conclusions of Law Pursuant to S.C. Code Section 17-27-80 in the above entitled case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Robin Grey Reese at Camille Griffin Graham Correctional Center, 4450 Broad River Road, Columbia, SC 29210, this 30th day of April, 2018.



Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 30th day of April, 2018.



(L.S.)

Notary Public for South Carolina

My Commission Expires: 10/30/2022