The Law Office of Tristan M. Shaffer

Litigation • Injury Law • Criminal Defense

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MAY 07 2018

S.C. SUPREME COURT

May 3, 2018

Daniel Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Chazmonte Brown v. State 2013-CP-21-0925

Dear Mr. Shearouse,

Please find the enclosed Notice of Appeal, Certificate of Service, and Order of Dismissal in the above referenced case.

Sincerely,

Tristan M. Shaffer

CC:Florence County Clerk of Court
Lindsey McCallister

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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MAY 07 2018
S.C. SUPREME COURT

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Thomas Russo, Circuit Court Judge

Case No. 2013-CP-21-0925

Chazmonte Brown,

Petitioner,

v.

The State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I certify that on the date below I served the Notice of Appeal on The State of South Carolina by mailing a copy to the Respondent at the address below.

May 3, 2018

Tristan M. Shaffer (SC Bar # 77565)
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Attorney for Petitioner

Other Counsel of Record:
Lindsey McCallister
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P.O. Box 11549
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Attorney for Respondent

THE STATE OF SOUTH CAROLINA
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APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Thomas Russo, Circuit Court Judge

Case No. 2013-CP-21-0925

Chazmonte Brown,

Petitioner,

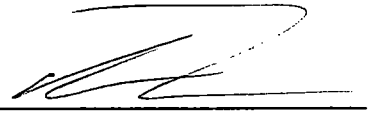
v.

The State of South Carolina, Respondent.

NOTICE OF APPEAL

Petitioner appeals the order dismissing his post-conviction relief action filed April 5, 2018 and received by Petitioner on April 9, 2018.

May 3, 2018



Tristan M. Shaffer (SC Bar # 77565)
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Lindsey McCallister
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Attorney for Respondent

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS FOR THE TWELFTH JUDICIAL CIRCUIT**
COUNTY OF FLORENCE	
	Case No.: 2013-CP-21-0925
CHAZMONTE L. BROWN,	**AMENDED ORDER OF DISMISSAL**
Applicant,	
vs.	
THE STATE OF SOUTH CAROLINA,	
Respondent.	

THIS MATTER comes before the Court by way of Applicant's second application for post-conviction relief filed April 8, 2013. Respondent made its Return on August 14, 2013, asking the Court to dismiss this application as successive, beyond the statute of limitations, and for failure to state a claim of newly discovered evidence such that the procedural bar should be waived. On August 22, 2013, this Court issued a Conditional Order of Dismissal, giving Applicant twenty days to show why the application should not be summarily dismissed. Applicant filed a response to the Conditional Order of Dismissal dated September 18, 2013, alleging he first learned of the existence of his codefendant's agreement with the State in this case in November of 2012, after Applicant's first PCR was already on appeal. Applicant then retained Tristan Shaffer, Esquire, as PCR counsel. Respondent filed a Motion for Judgment on the Pleadings on July 11, 2014. Mr. Shaffer filed a Motion to Limit State's Argument Based on Collateral Estoppel on Applicant's behalf on May 23, 2016, to preclude Respondent from arguing Epps did not have an agreement with the State at the time of his testimony.

On June 2, 2016, this Court convened a hearing on Applicant's collateral estoppel motion and Respondent's Motion to Dismiss at the Florence County Courthouse before the Honorable

Jocelyn Newman. Applicant was represented by Mr. Shaffer, and Respondent was represented by J. Croom Hunter, Esquire. At that time, Respondent did not oppose Applicant's collateral estoppel motion, and the motion was granted by Judge Newman on September 9, 2016. Judge Newman also granted Respondent's Motion to Dismiss and issued an Order to that effect dated December 28, 2016. Applicant subsequently filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, on January 20, 2017. Respondent filed a Return on February 8, 2017. Judge Newman granted Applicant's motion on April 24, 2017, and ordered Respondent to set this matter for an evidentiary hearing on Applicant's allegation of a Brady[1] violation during the next available term of Court.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. Applicant was indicted at the June 2009 term of the Florence County Grand Jury in indictment 2009-GS-21-00994 for Armed Robbery (Count One) and Possession of a Weapon during the Commission of a Violent Crime (Count Two). Applicant was represented on these charges by Karen Parrott, Esquire (Counsel). While out on bond for the armed robbery charge, Applicant was arrested on warrants M280283 and M272743 for distribution of marijuana. On December 15, 2010, Applicant pleaded guilty to armed robbery and two counts of distribution of marijuana, first offense. The Honorable Michael G. Nettles imposed a negotiated sentence of fifteen years for the armed robbery charge, with a concurrent five years for each of the marijuana charges. Applicant did not appeal his plea or sentence.

[1] Brady v. Maryland, 373 U.S. 83 (1963).

Applicant filed his first post-conviction relief application on May 6, 2010. In his application, he alleged he was being held unlawfully because of "Fraudulent/Illegal Warrants & indictments[.]" Charles T. Brooks, III, Esquire, represented Applicant on his first PCR. The Honorable William H. Seals, Jr., convened a hearing on the matter on February 3, 2013. At the hearing, Applicant also raised allegations of ineffective assistance of counsel and that his plea was involuntary. Judge Seals denied post-conviction relief and dismissed Applicant's first PCR by written order dated June 18, 2012, and filed June 19, 2012.

Applicant appealed the denial of his first PCR. Robert M. Pachak, Esquire, of the Commission on Indigent Defense perfected Applicant's appeal with the filing of a Johnson[2] petition on November 14, 2012. On February 7, 2013, the South Carolina Supreme Court denied Applicant's petition for a writ of certiorari. The remittitur was returned to the circuit court on February 25, 2013.

Applicant's Current Application

Applicant filed the present action on April 8, 2013. In the present application Applicant alleges "newly discovered evidence" and "prosecutorial misconduct." Applicant gave the following bases for the allegations:

(a) I discovered in November 2012 that Brady information was not disclosed to me.

(b) Prosecutor did not disclose my co-defendant's deal.

The Court also had before it the following documents: the PCR application; the State's Return and Motion to Dismiss; Applicant's guilty plea transcript; Applicant's Motion to Limit the State's Argument Based on Collateral Estoppel; the Order Granting PCR in the Montarrio Graham case; and the transcript of the PCR evidentiary hearing of Latisha Cochran. Additionally, the Court

[2] Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

has considered the testimony of Applicant; his defense counsel, Karen Parrott, Esquire; and Hank Anderson, Esquire, who represented Applicant's co-defendant, Quentin Epps. The Court also heard and considered the testimony of David Richardson, Esquire, who testified for the State.

SUMMARY OF RELEVANT FACTS

On December 15, 2010, Applicant pleaded guilty shortly after jury selection in the trial of his case. However, one of Applicant's co-defendants, Montarrio Graham (Graham), proceeded to trial that same day. Another co-defendant, Quentin Epps (Epps), testified at a pre-trial hearing before Applicant's plea and during Graham's trial. When Epps testified during Graham's trial, he stated he did not have an offer from the State to reduce his charges or sentence in exchange for his testimony. Several weeks after Graham's trial, the State reduced Epps's armed robbery charge to accessory after the fact. On January 24, 2011, Epps pleaded guilty to accessory after the fact and received an eighteen-month sentence concurrent with a probation revocation.

Graham appealed his conviction. During the course of his appeal, Graham discovered Epps had falsely testified concerning his deal. Graham withdrew his appeal and filed an application for PCR on March 9, 2012. An evidentiary hearing was convened before the undersigned on or about October 16, 2012. In an order dated November 2, 2012, this Court granted Graham's PCR pursuant to Brady v. Maryland, 373 U.S. 83 (1963), Napue v. Illinios, 360 U.S. 264 (1959), and Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006). In that order, the Court specifically found Epps's defense counsel "credibly testified that the State had offered to reduce Epps's armed robbery charge in exchange for his testimony." Further, the Court found Graham's "right to due process was clearly violated by the State's failure to correct known false testimony from Epps." On December 6, 2012, Graham was informed the State would not appeal this Court's decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Prosecutorial Misconduct/*Brady* Violation

Applicant alleges the State committed a Brady violation by failing to disclose the existence of a deal to reduce the charge of his co-defendant (Epps) in exchange for Epps' testimony against Applicant and Graham.

i. Relevant Testimony from PCR Hearing

Applicant testified he is currently being housed in Evans Correctional Facility on a fifteen-year sentence for armed robbery; he expects to serve 85% of his sentence, with a projected release date in September of 2022. Applicant testified he had planned to go to trial until the day it began, when he found out Epps and another inmate would testify against him, and he was afraid they would fabricate their testimony. Applicant testified that up until that point, he did not believe Epps would be present at trial. Applicant testified he did not find out about Epps's agreement with the State until 2012, at which time he filed this PCR action. Applicant testified that if he had known about Epps's deal at the time of trial, he would have proceeded with trial, and he would have wanted his attorney to cross-examine Epps about the agreement.

Counsel testified Applicant was arrested on the armed robbery charge for an incident that occurred at a small corner store in Lake City. Counsel testified that in addition to Epps's testimony

against Applicant, law enforcement and several additional witnesses were prepared to testify. Counsel could not recall whether Applicant gave a statement to police, but testified there was no physical evidence. Counsel testified Applicant began asking her about a plea during jury selection on the morning of trial, and she was able to negotiate with the solicitor during a break. Counsel further testified Applicant agreed to a negotiated sentence of fifteen years on the armed robbery plus five years each on the two marijuana charges, and the State agreed to drop the weapon charge in return.

Counsel testified she was never specifically told Epps had a deal, and she did not confirm he received one until much later. Counsel testified that, in her experience, co-defendants often testify against one another, and the standard practice in Florence County is for the solicitor to agree to "help" the testifying codefendant; however, there is generally no specific deal made as to a sentence. Counsel further testified that she knew in advance Epps was going to testify, and she discussed it with Applicant the morning of trial. Importantly, Counsel testified she assumed Epps had some kind of offer of help from the State, and her standard conversation with Applicant would have included a discussion that Epps was likely receiving help on his charges in exchange for his testimony. Counsel also testified that she would have been prepared to cross-examine Epps on the existence of a deal had Applicant's trial continued. Additionally, Counsel testified that even if she had known the specifics of the State's agreement with Epps, it would not have changed her advice to Applicant that he should accept the plea offer.

Assistant Solicitor David Richardson, who helped prosecute the cases against Applicant and Graham, also testified. Mr. Richardson testified Patricia Parr was the first-chair, and she asked him to help when it became clear there would be a trial involving multiple codefendants. Mr. Richardson testified he was not present for all of Ms. Parr's pre-trial preparation, but he was

involved in the majority of it, including the substantive conversation regarding Epps's cooperation between himself, Ms. Parr, Epps, and Epps's attorney, Hank Anderson. Mr. Richardson testified the meeting took place in a conference room of the courthouse; he and Ms. Parr questioned Epps about his knowledge of the crime, and Epps agreed to testify. Mr. Richardson testified Epps was included on the State's witness list, which was disclosed to the defense in advance, though he was not sure exactly when.

Mr. Richardson testified that both his personal standard practice and that of the Solicitor's Office is to make only a general offer of help in exchange for testimony. Mr. Richardson testified he does not make a specific agreement to a certain sentence or a certain charge because it damages the witness's credibility, and the jury might think the witness is just saying whatever the State wants. Finally, Mr. Richardson testified he remembered Epps being asked about a deal, and he felt Epps's testimony was accurate because nothing specific had been promised.

Hank Anderson, Epps's defense attorney, testified he recalled the meeting with the Solicitor's Office regarding his client's testimony for the State. Mr. Anderson testified the State had already made an offer of ten years, which was not conditioned on any testimony by Epps. Mr. Anderson further testified it was his belief after the meeting that the State would reduce Epps's charge to something other than armed robbery so Epps could avoid the ten-year mandatory-minimum sentence. However, Mr. Anderson testified the State did not make any promises as to a specific sentence or what the reduced charge would be.

ii. Brady

Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Brady v. Maryland, 373 U.S. 83, 87 (1963). Such a claim is complete if the accused can demonstrate: (1) the evidence was favorable to the accused; (2) it was

in the possession of or known to the prosecution; (3) it was suppressed by the prosecution; and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Under this requirement, "favorable" evidence includes both exculpatory evidence and impeachment evidence. State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998). "Determining whether evidence withheld by the state is 'material' under Brady turns on whether the cumulative effect of the withheld evidence results in a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." State v. Hill, 368 S.C. 649, 661, 630 S.E.2d 274, 280–81 (2006). Put another way, to establish a Brady violation, the aggrieved party must show "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 434 (1995).

Applicant argues the State had an obligation to disclose the specifics of its agreement with Epps once Applicant's trial started. Applicant further argues that his case is no different from that of his co-defendant, Graham, for whom this Court previously granted post-conviction relief. As support for his position, Applicant cites to Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999) ("[Applicant] may challenge the voluntary nature of his guilty plea in a PCR action by asserting an alleged Brady violation") and Napue v. Illinois, 360 U.S. 264 (1959).

Applicant's case is distinguishable from Napue, which, in turn, distinguishes it from Graham's PCR action. In Napue, the State of Illinois presented a murder case, which was tried to verdict. During the course of the trial, the state's principal witness gave perjured testimony that he had received no promise of consideration in return for his testimony when, in fact, the prosecutor had promised him consideration. The Supreme Court held that the State's failure to correct the false testimony of an important witness denied petitioner due process of the law in violation of the

Fourteenth Amendment. Id. Likewise, in Graham's case, Epps's in-court testimony given during Graham's jury trial that he had not been promised a deal of leniency for his testimony went uncorrected by the prosecution, thus providing a solid legal basis for post-conviction relief. The constitutional violation in Graham's case was the State's failure to disclose its deal with Epps *as well as* the State's failure to correct the false testimony at trial as to the very existence of a deal. Here, however, Applicant's case was resolved by a guilty plea shortly after the jury had been struck; no testimony was ever taken.

Applicant's case is also distinguishable from Gibson because of the nature of the nondisclosed information in that case. There, the prosecutor failed to disclose material exculpatory evidence that he and law enforcement had visited the crime scene with a key witness, Anna Ross, who claimed to have seen the shooting through a window, but when they confronted her with information that the view from that window was obstructed, Ross changed her original statement to say she must have seen the shooting from a different vantage point. Gibson, 334 S.C. at 526-27, 514 S.E.2d at 326. At Gibson's PCR hearing, his defense attorney "said he thought he could prove Ross was lying, but no one ever told him that Ross had changed her statement . . . [n]or did anyone ever tell Gibson that the prosecutor and police were convinced she was lying." 334 S.C. 515, 521. This was information that could not possibly have been assumed or presumed; "it is reasonably probable that, had the prosecutor revealed the suppressed information, Gibson would have chosen to stand trial instead of pleading guilty. Instead of merely hoping he could impeach Ross as a liar, Gibson would have known about Ross's inconsistent statements and the revealing on-the-scene confrontation." Id. at 527.

Here, the nature of the nondisclosed information was the existence of a deal between Epps and the State. At the PCR Hearing, Counsel testified that during the representation of her client,

she operated under the assumption that Epps had made some type of agreement with the State in exchange for his testimony:

> Q. [The State]: Okay. So when you have a co-defendant who testifies against another co-defendant, what is your usual feeling about that or thoughts about that?
> A. [Counsel]: [T]hey're usually offered a deal in order to testify, but the question becomes for everyone involved what kind of a deal is being made for their testimony. And so the way that they usually go about this here in this circuit . . . they will tell them that I will help you on the other end of this, but they don't make them a specific deal because they don't want to have specific numbers available for cross-examination and used for impeachment or bias, that sort of thing. . . .
> . . .
> Q. Okay. So going into this trial with Mr. Brown, you get there and you see that Mr. Epps is prepared to testify against him, correct, or did you know that he was going to testify ahead of time or did you find out that day?
> A. We knew that he was going to be testifying and I believe he would have been disclosed as part of the witness list.
> Q. Okay. So you at least knew that you had a co-defendant who was going to testify against him ahead of time?
> A. Yes.
> Q. And did you discuss that with Mr. Brown, the fact that Mr. Epps would be testifying against him?
> A. I would have, yes.
> Q. Before the morning of the trial?
> A. Yes.
> . . .
> Q. Did you discuss with Mr. Brown the fact that if a co-defendant was testifying against him that they possibly were doing so because they thought they could get some help?
> A. I can't recall specifically, but I'm sure - - I mean, that's part of the normal conversation when you have this situation. So, I mean, by that I would assume that I did. I'm almost positive I did, but I can't remember a specific conversation.
> . . .
> Q: If you had known for sure that Mr. Epps had an agreement about, you know, getting some help on his charges or whatever after his testimony, would that have changed your advice to Mr. Brown in any way?
> A. No, because I would have been assuming that he had a deal to begin with.

Transcript of Record 13:12—17:11, Aug. 30, 2017. Counsel, who has been practicing solely in the arena of criminal defense for the past fourteen years, testified that she has had co-defendants

testify against her client (and vice versa) throughout her career, and that she discusses the implications of a "deal" with her client as a matter of course when that situation arises. Tr. of R. 12:23—13:11. Not only is the nature of the non-disclosed information in Applicant's case quite different from that in Gibson, but it could have been—and actually was—presumed to be true.

Additionally, the Court finds the disclosure of any specifics regarding the agreement between Epps and the State would have been of limited impeachment value at Applicant's trial. See United States v. Ruiz, 536 U.S. 622 (2002) (holding the Constitution does not require the government to disclose impeachment information prior to entering a plea agreement with a defendant because impeachment information is related to the right to a fair trial, which a defendant waives upon entering a plea agreement, rather than the voluntariness of the plea). During Graham's trial, Epps was thoroughly cross-examined as to the benefit he could receive from testifying for the State and was impeached on his potential bias. See, e.g., State v. Cheeseboro, 346 S.C. 526, 553-554, 552 S.E.2d 300, 314-315 (2001) (finding the nondisclosure of evidence did not deprive Cheeseboro of a fair trial where the evidence had limited impeachment value and the witness was thoroughly impeached with other evidence); Duncan v. State, 281 S.C. 435, 439, 315 S.E.2d 809, 811 (1984) (finding a failure by the solicitor to disclose impeachment evidence was not a material Brady violation and did not require reversal where the witness had nonetheless been impeached through prior convictions). Finally, the Court finds Applicant's testimony at the evidentiary hearing indicates it was not just the testimony of Epps that influenced Applicant's decision to stop his trial and plead guilty; Applicant testified there was a second witness present to testify against him, which also influenced his decision. Thus, this Court finds that the "Epps deal" is not material under Brady.

CONCLUSION

Based on all the forgoing, this Court finds and concludes that Applicant failed to present evidence of a Brady violation during the course of his case; thus, Applicant has not established any constitutional violations or deprivations before or during his trial and guilty plea.

IT IS THEREFORE ORDERED THAT:

1. **This application for post-conviction relief be denied and dismissed with prejudice; and**
2. **Applicant be remanded to the custody of Respondent.**

The Court notes Applicant must file and serve a notice of appeal within thirty days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, Applicant must serve and file a notice of appeal on his own behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

AND IT IS SO ORDERED this 4th day of April, 2017.

The Honorable Thomas A. Russo
Presiding Judge
Twelfth Judicial Circuit

Florence, South Carolina

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FOLLS O'HARA
CLERK OF COURT
FLORENCE, SC

STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	)	IN THE COURT OF COMMON PLEAS FOR THE TWELFTH JUDICIAL CIRCUIT
Chazmonte L. Brown, #334443, Applicant, v. State of South Carolina, Respondent.	)	C.A. No. 2013-CP-21-925 **CONDITIONAL ORDER OF DISMISSAL**

This matter comes before the court by way of an Application for Post-Conviction Relief filed April 8, 2013. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. Applicant was indicted at the June 2009 term of the Florence County Grand Jury in indictment 2009-GS-21-00994 for Armed Robbery (Count One) and Possession of a Weapon During the Commission of a Violent Crime (Count Two). Applicant was represented on these charges by Karren Parrott, Esquire. While out on bond for the armed robbery charge, Applicant was arrested on warrants M280283 and M272743 for Distribution of Marijuana. On December 15, 2010, Applicant pled guilty to Armed Robbery and two counts of Distribution of Marijuana, First Offense. The Honorable Michael G. Nettles imposed a negotiated sentence of confinement for a period of fifteen (15) years for the armed robbery charge, with a concurrent five (5) years for each of the marijuana charges. Applicant did not appeal his plea or sentence.

Mailed 6/3/14
cc: Thomas

Applicant filed his first post-conviction relief Application on May 6, 2010. In his application, he alleged he was being held unlawfully because of "Fraudulant/Illegal Warrants & indictments[.]" Charles T. Brooks, III, Esquire, represented Applicant on the first PCR. The Honorable William H. Seals, Jr., convened a hearing on the matter on February 3, 2013. At the hearing, Applicant also raised allegations of ineffective assistance of counsel and that his plea was involuntary. Judge Seals denied post-conviction relief and dismissed Applicant's first PCR by written order dated June 18, 2012, and filed June 19, 2012.

Applicant appealed the denial of his first PCR. Robert M. Pachak, Esquire, of the Commission on Indigent Defense perfected Applicant's appeal with the filing of a Johnson[1] petition on November 14, 2012. On February 7, 2013, the South Carolina Supreme Court denied Applicant's petition for a writ of certiorari. The remittitur was returned to the circuit court on February 25, 2013.

II. CURRENT APPLICATION

In his current application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Newly Discovered Evidence
   A. I discovered in November 2012 that Brady information was not disclosed to me
2. Prosecutorial Misconduct
   B. Prosecutor did not disclose my co-defendant's deal

Respondent made a Return and Motion to Dismiss the Application on Aug. 14, 2013 2013. Respondent asked this Court to dismiss the Application as successive, untimely, and failing to state a claim upon which relief can be granted.

[1] Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988)

III. FINDINGS OF FACT AND CONCLUSION OF LAW

S.C. Code Ann. § 17-27-70(c) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law in ruling on Respondent's motion to dismiss:

A. Successive Application

This Court finds that this Application for Post-Conviction Relief should be summarily dismissed because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). S.C. Code Ann. § 17-27-90 requires that:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. If the applicant could have raised these allegations in a

previous application, then the applicant may not raise those grounds in successive applications. Id. The applicant bears the burden of showing that the allegations could not have been raised previously. Id.

Applicant could have raised the "new" grounds for relief in his prior post-conviction relief application. The record clearly indicates Applicant was aware of his co-defendant's plea. Any claim related to that plea should have been raised as a failure to investigate claim in the prior PCR. Applicant has failed to present any reasons why he failed to the current allegation in his previous application. Therefore, the Court finds that summary dismissal is appropriate.

B. Failure to Timely File

The Court further finds that this Application should be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-45(a) provides that:

> "An application for relief filed pursuant to this chapter must be filed within one year after the entry of a 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."

This statute of limitations applies to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996).

Applicant plead to the offenses he challenges in this Application on December 15, 2010. Applicant was therefore required to file his application before December 15, 2011. This Application was filed on April 8, 2013, which was well beyond the time that the statutory filing period had expired. Therefore, the Court finds that summary dismissal is appropriate.

C. Failure to State a Claim Of Newly Discovered Evidence

The Court further finds that this Application should be dismissed for failing to state a claim of newly discovered evidence. To obtain a new trial based on newly discovered evidence, the party must show that the evidence: (1) would probably change the result of a new trial; (2) has been discovered since the trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)).

Applicant alleges he "just discovered Brady information, relating to my co-defendant's deal, was not disclosed[.]" However, Applicant has failed to identify this "newly discovered evidence" with specificity. Thus, he has not shown he can satisfy each of the elements of a newly discovered evidence claim. Even taking his allegations at face value, information relating to a co-defendant's plea offer would merely be impeachment evidence at trial. See State v. Moore, 337 S.C. 104, 108-09, 522 S.E.2d 354, 357 (Ct. App. 1999) (holding that "a co-defendant's guilty plea may, in some cases, be admissible to impeach the credibility of a testifying defendant [but] are not relevant to or admissible as substantive evidence of a defendant's guilt or innocence."). Furthermore, a knowing and voluntary guilty plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. See Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975); State v. Fuller, 254 S.C. 260, 174 S.E.2d 774 (1970)). Thus, Applicant has not shown this "newly discovered evidence" warrants a new trial. Therefore, the Court finds that summary dismissal is appropriate.

IV. CONCLUSION

The Court finds that the record before the Court creates no genuine issue of material fact and Respondent is therefore entitled to judgment as a matter of law.

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Florence County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Joshua L. Thomas, Esquire
Post Office Box 11549
Columbia, South Carolina 29211

IT IS SO ORDERED.

THE HONORABLE D. CRAIG BROWN
Circuit Court Judge

8-19, 2013
Florence, South Carolina

Law Office of Tristan M. Shaffer
P.O. Box 1027
Chapin, SC 29036

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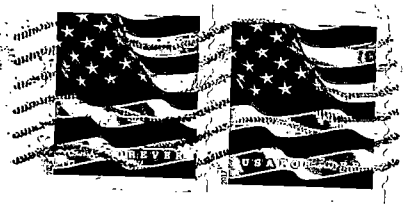

Daniel Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

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