STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

DION O. TAYLOR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001397

BRIEF OF PETITIONER

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ISSUE PRESENTED

Did the post-conviction relief (PCR) judge err in summarily dismissing Petitioner's second PCR application without conducting an evidentiary hearing to determine if the issues raised therein could not have been raised in Petitioner's first PCR action, in which Petitioner represented himself, due to Petitioner's mental incompetence, cf. Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009); Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004)?

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Petitioner on January 5, 2009 for criminal domestic violence, second or subsequent offense, and armed robbery. App. 73-76. On June 3, 2009, Petitioner pled guilty before the Honorable Roger M. Young, Sr. App. 1. Assistant Solicitor Cody J. Groeber represented the state, and Trip Riesen represented Petitioner. App. 1. Judge Young sentenced Petitioner to ten years' imprisonment for armed robbery and three years concurrent for criminal domestic violence. App. 18, ll. 3-9.

On October 6, 2009, Petitioner filed an application for post-conviction relief (PCR). App. 33. The state filed a return to this application on February 1, 2010. App. 33. With the assistance of counsel, Petitioner filed an amended application on June 21, 2011.[1] App. 33. The matter proceeded to an evidentiary hearing on March 1, 2011 before the Honorable R. Markley Dennis, Jr. App. 34. At the outset of the hearing, Petitioner moved to relieve his counsel, Florence Scarborough. App. 34. Judge Dennis granted Petitioner's motion. App. 34. Consequently, he proceeded *pro se*. Assistant Attorney General Matthew J. Friedman represented the state. App. 34. By order filed April 13, 2011, Judge Dennis denied Petitioner relief. App. 34. Petitioner's appeal from the order of dismissal was ultimately dismissed by this Court.[2] App. 34-35.

---

[1] Attached to the amended application filed by counsel was a *pro se* pleading alleging numerous grounds of ineffective assistance of counsel, among other claims. App. 33.

[2] Petitioner filed a premature notice of appeal on March 14, 2011 before the order of dismissal was signed and filed. This appeal was dismissed by this Court on April 21, 2011 for failure to comply with South Carolina Appellate Court Rules 203(b)(1) and 243(b). App. 34. Petitioner filed a second timely notice of appeal on May 13, 2011. On August 3, 2011, this Court dismissed the appeal for failure to order the transcript. App. 35.

On December 11, 2012, Petitioner filed a second application for post-conviction relief. App. 20-30. On March 31, 2014, the state, represented by Assistant Attorney General J. Croom Hunter, filed a return and motion to dismiss. App. 32-42. On July 21, 2014, the Honorable Stephanie P. McDonald issued a conditional order of dismissal finding Petitioner's application should be summarily dismissed as successive and untimely. App. 43-49. Petitioner filed a *pro se* response to the conditional order of dismissal requesting an evidentiary hearing as to why his second application should not be dismissed. App. 51. Judge Dennis ultimately issued a final order of dismissal without conducting an evidentiary hearing. App. 70-72.

On November 24, 2015, prior appellate counsel filed a petition for writ of certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), and a motion to be relieved as counsel. Petitioner filed a *pro se* response. By order dated March 24, 2017, this Court denied the motion to be relieved as counsel and directed the parties to address the issue argued in this brief. On May 11, 2017, Petitioner filed a petition for writ of certiorari addressing the question specified in the order. The state filed a return to this petition on September 22, 2017. By order dated April 19, 2018, this Court granted the petition and ordered further briefing pursuant to Rule 243(j), SCACR.

This brief of petitioner follows.

STANDARD OF REVIEW

The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the Court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, the Court reviews questions of law de novo, with no deference to trial courts. Id. at 180-181, 810 S.E.2d at 839-840 (citing Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

STATEMENT OF FACTS

Petitioner suffers from multiple mental health illnesses, including bipolar disorder, major depressive disorder, and intermittent explosive disorder. App. 15, ll. 14-18. In order to manage his illness, Petitioner takes a regimen of psychotropic medications. App. 51; App. 9, ll. 11-24. According to Petitioner, these medications "promote lucidity and competence." App. 51.

After he was found competent to stand trial, Petitioner pled guilty to criminal domestic violence and armed robbery on June 3, 2009 before Judge Young. App. 1. At the time of his guilty plea, Petitioner was taking Tegretol and Prozac, which were prescribed by medical professionals at the Charleston County Detention Center. App. 9, ll. 14-18. Despite recognizing that it may have no effect, Judge Young ordered the Department of Corrections to continue prescribing Petitioner the medications necessary to manage his mental illness once he was transferred to the department's custody. App. 18, ll. 10-15.

While Petitioner was housed at Allendale Correctional Institution after his conviction, he regularly saw a mental health counselor and was properly prescribed numerous psychotropic medications. However, on February 23, 2011, Petitioner was placed in the Special Management Unit (SMU) for alleged disciplinary actions and was no longer given his prescribed medications, which included both a morning and afternoon dosage. App. 66-67. Petitioner submitted an emergency inmate grievance form on February 28, 2011 complaining that he had been denied access to his medication since he was placed in SMU. App. 66.

On March 7, 2011, the warden responded to Petitioner's grievance. His response stated, "Nurse Derrick, Health Care Authority for Allendale, was contacted and stated that *Medical was not aware that you had been placed in Special Management Unit (SMU)* for disciplinary reasons. *Your bed assignment has been updated and your name has been placed on the pill issuance list*

for SMU. I consider this issue resolved." App. 67 (emphasis added). Based on this documentation, it appears Petitioner did not receive his prescribed medications from February 23, 2011 through at least March 7, 2011, if not later.

It was during this time period in which Petitioner was not receiving his psychotropic medications that the evidentiary hearing to address the allegations Petitioner raised in his first application for post-conviction relief was held. At the beginning of the hearing, which occurred on March 1, 2011, Petitioner moved to relieve his counsel, Florence Scarborough, and appear *pro se.* App. 34. Judge Dennis granted Petitioner's motion. Consequently, Petitioner represented himself at the hearing. App. 34. On April 13, 2011, Judge Dennis denied Petitioner relief. App. 34.

On December 11, 2012, Petitioner filed a second application for post-conviction relief asserting ineffective assistance of counsel, among other claims. App. 21-30. On March 31, 2014, the state filed a return and motion to dismiss arguing Petitioner's application should be summarily dismissed for failure to comply with the one year statute of limitations and because the application was successive to Petitioner's prior application. App. 32-42. The state asserted that Petitioner failed to establish sufficient reason why he could not have raised his current allegations in his previous application. App. 40.

On July 21, 2014, Judge McDonald issued a conditional order of dismissal finding Petitioner's application should be summarily dismissed for being successive and untimely. The order stated Petitioner's application would be dismissed with prejudice unless Petitioner provided specific reasons, factual or legal, why the application should not be dismissed. App. 43-49.

Petitioner filed a *pro se* response to the conditional order of dismissal requesting an evidentiary hearing as to why his second application should not be dismissed. App. 51. In his response, Petitioner asserted that he was not competent when he chose to proceed without counsel and when he subsequently represented himself at his prior PCR hearing. App. 51. Specifically, Petitioner argued:

> Applicant [Petitioner] was not in [a] lucid state when he [chose] to go forth without counsel nor when he subsequently represented himself pro se at [his] initial [post-conviction relief] hearing. It can be shown through the record that the Applicant [Petitioner] suffers from multiple mental health illnesses in which he is prescribed different psychotropic [medications] promoting lucidity and competence. Due to malfeasance or negligence the Applicant [Petitioner] wasn't medicated by healthcare persons at [the] Institution he was and is housed at (re Allendale Correctional Institution). Record shows [Petitioner's] initial evidentiary hearing was on 3-1-11. Applicant [Petitioner] submitted [a] grievance (Ex. A) concerning him not receiving medications since 2-23-11. Exhibit A shows warden of Institution (ACI) responding to grievance; in essence he states medical didn't know where I was being housed since 2-23-11. [H]is response to said grievance was 3-7-11, proving Applicant [Petitioner] was not medicated at hearing.
>
> . . .
>
> Further evidence (Ex. B) shows just how not taking his medications can effect the Applicant [Petitioner] adversely. Without being able to rationalize, think logically, organize, and articulate adequately, he [Petitioner] could not effectively and with specificity set forth claims of ineffective assistance of counsel and other meritorious claims. The Applicant [Petitioner] could not be reasonably expected to prepare for a hearing under such duress in addition. His state should be construed as one of incompetence and the courts have ruled on this issue accordingly. Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (S.C. 2004): "Post-conviction relief petitioner cannot delay his collateral review . . . due to his incompetency. [H]owever, if at a future date the petitioner regains his competency and discovers that at his original PCR hearing, his incompetency prevented his ability to assist his counsel on a . . . claim of ineffective assistance of counsel, he may raise that claim in a subsequent proceeding."

App. 52.

Despite Petitioner's assertion that he was not competent during his first PCR hearing in which he represented himself because he was not properly medicated, Judge Dennis, *who was*

the same judge who presided over Petitioner's first PCR action, issued a final order of dismissal without conducting an evidentiary hearing. App. 70-72. Judge Dennis found Petitioner failed to establish a sufficient reason why the conditional order of dismissal should not become final. App. 71. He further found that Petitioner's current application must be summarily dismissed because it is successive and was filed past the one year statute of limitations. App. 72.

ARGUMENT

The post-conviction relief (PCR) judge erred in summarily dismissing Petitioner's second PCR application without conducting an evidentiary hearing to determine if the issues raised therein could not have been raised in Petitioner's first PCR action, in which Petitioner represented himself, due to Petitioner's mental incompetence, cf. *Ferguson v. State*, 382 S.C. 615, 677 S.E.2d 600 (2009); *Council v. Catoe*, 359 S.C. 120, 597 S.E.2d 782 (2004).

The judge erred in summarily dismissing Petitioner's second PCR application without conducting an evidentiary hearing to determine whether Petitioner's mental incompetence prevented him from raising the claims raised in his second application in his first PCR action where Petitioner represented himself. In his response to the conditional order of dismissal, Petitioner established that during the week prior to his PCR hearing and on the actual day of the hearing, in which he chose to proceed without counsel, he had not received his psychotropic medications, which help manage his severe mental illness. App. 66-67. Petitioner, who suffers from bipolar disorder, major depressive disorder, and intermittent explosive disorder, asserted that these medications help promote lucidity and competence. App. 15, ll. 14-18; App. 51. He argued that because he was not properly medicated, he was mentally incompetent at the time of the hearing and, consequently, was unable to effectively and with specificity set forth his claims of ineffective assistance of counsel, and other meritorious claims. App. 52.

Any person who has been convicted of or sentenced for a crime and who claims the conviction or sentence is in violation of the United States Constitution or the laws of this state may file an application for post-conviction relief. S.C. Code Ann. § 17-27-20. The application "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." S.C. Code Ann. § 17-27-45(A).

Generally, once a court receives an application, the court must hold an evidentiary hearing to receive evidence and arguments. S.C. Code Ann. § 17-27-80. The court may only dismiss an application without a hearing when "on the basis of the application, the answer or motion, and the record," the court is satisfied "that the applicant is not entitled to post-conviction relief and no purpose would serve by any further proceedings." S.C. Code Ann. § 17-27-70(b). Thus, "summary dismissal without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief." Al-Shabazz v. State, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (1999) (citing S.C. Code Ann. § 17-27-70(b) and (c)).

A successive PCR application is allowed when a reason exists to permit a person under sentence to litigate again. Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 736 (1980). A person may file a successive application by setting forth a sufficient reason that the ground was not asserted or was inadequately raised in a prior application. S.C. Code Ann. § 17-27-90.

Here, the grounds alleged in Petitioner's second application were not asserted or adequately raised in his first application due to his mental incompetence. In his response to the conditional order of dismissal, in which he requested an evidentiary hearing as to why his

application should not be dismissed as successive and untimely, Petitioner cited to Council v. Catoe, 359 S.C. 120, 123, 597 S.E.2d 782, 783 (2004).

In Council, this Court addressed whether an applicant's PCR action should proceed if he is found to be incompetent. Donnie Council was diagnosed with schizophrenia and found mentally incompetent before his evidentiary hearing. The PCR judge granted Council's motion to indefinitely stay the proceedings until he regained his competency. Id. at 123, 597 S.E.2d at 784. In holding that the PCR judge erred, this Court asserted that an applicant cannot delay the collateral review of his trial proceedings due to his incompetency. Id. at 129, 597 S.E.2d at 787. However, this Court exclaimed, "If, at a future date, the petitioner regains his competency and discovers that at his original PCR hearing, his incompetency prevented his ability to assist his counsel on a fact-based claim of ineffective assistance of counsel, he may then raise that claim in a subsequent proceeding." Id.

Subsequently, in Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009), this Court held that the one year statute of limitations for filing an application for post-conviction relief set forth in S.C. Code Ann. § 17-27-45(a) should be tolled by an applicant's mental incapacity. Ferguson pleaded guilty to various property offenses in December 1996 and was sentenced to fifteen years, suspended on five years' probation. Id. at 616, 677 S.E.2d at 601. In March 2001, Ferguson pleaded guilty to numerous drug offenses, and his probation on his 1996 convictions was revoked in full. Id. In February 2002, Ferguson filed a PCR application alleging ineffective assistance of counsel in connection with his 1996 guilty plea. Id. His application was dismissed after a hearing on the ground that it was barred by the one year statute of limitations. Id.

In its opinion remanding the case, this Court emphasized that every defendant has a right to file one PCR application, and that under the PCR rules, an applicant is entitled to a full

adjudication on the merits of the original application, or "one bite at the apple." Id. at 619, 677 S.E.2d at 602; See Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1993); Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002). This Court concluded that if an applicant was prevented from filing for PCR by reason of his mental incompetency, then he did not receive his "one full bite at the apple." Ferguson, 382 S.C. at 619-620, 677 S.E.2d at 602.

Consequently, this Court held that if an applicant demonstrates the failure to timely file for PCR was due to mental incompetency, the statute of limitations should be tolled. Id. at 619, 677 S.E.2d at 602. As to Ferguson, the Court held the proper remedy was to remand to the PCR court for a hearing as to whether Ferguson's mental incapacity prevented him from filing an application in the one year following his 1996 guilty plea. Id. at 620, 677 S.E.2d at 602. The Court continued, "If the PCR court finds mental incompetence prevented his [Ferguson's] filing a PCR application, the court should determine the duration of the incompetence, and whether the application was filed within one year of Ferguson regaining his competency. PCR should proceed only if Ferguson's application was timely filed within one year of the date that he regained competence." Id.

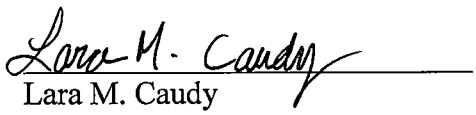
Because of Petitioner's mental incompetence, he did not receive his "one full bite at the apple" during his first PCR action in which he represented himself. See Odom, 337 S.C. at 261, 523 S.E.2d at 755. In his response to the conditional order of dismissal, Petitioner clearly established that in the week proceeding his first PCR hearing, and on the actual day of the hearing where Petitioner represented him, Petitioner had not received his prescribed psychotropic medications, which help manage his mental illness. App. 52. Consequently, the PCR judge erred by summarily dismissing Petitioner's second application without conducting an evidentiary hearing.

Respectfully, pursuant to Council and Ferguson, this Court should remand this case to the PCR court for a hearing to determine whether Petitioner's mental incompetence prevented him from adequately raising the claims raised in his second application during his first PCR action. If the PCR court finds mental incompetence prevented Petitioner from raising the claims raised in his second application during his first PCR action, the court should determine whether Petitioner's second application was filed within one year of him regaining competency. See Ferguson, 382 S.C. at 620, 677 S.E.2d at 602.

CONCLUSION

The PCR judge erred in summarily dismissing Petitioner's second PCR application without conducting an evidentiary hearing to determine whether Petitioner's mental incompetence prevented him from raising the claims raised in his second application in his first PCR action in which he represented himself. Petitioner respectfully requests this Court remand this case to the PCR court to conduct an evidentiary hearing.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of May, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

DION O. TAYLOR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Megan Harrigan Jameson, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served upon Dion O. Taylor at 2208 Easton Street, North Charleston, SC 29405, this 30th day of May, 2018.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

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

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.