STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2017-001570

JOHN WILLIE MACK, SR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE

Did the lower court properly dismiss Petitioner's application for post-conviction relief, where the "Access to Justice Post-Conviction DNA Testing Act" (S.C. Code Ann. §§ 17-28-10 to 120) explicitly states that the performance of counsel pursuant to this Act shall not form the basis for relief in any post-conviction relief proceeding?

STATEMENT OF THE CASE

During their April 2006 term, the Spartanburg County Grand Jury indicted John Willie Mack, Sr. ("Petitioner") for grand larceny (2006-GS-42-1166) and burglary, first degree (2006-GS-42-1167). (App. p. 364-367). Petitioner proceeded to trial, where a jury found him guilty as indicted. (App. p. 157). During trial, the State presented evidence of Petitioner's blood being found on the scene of the crime, as confirmed by testing performed by the South Carolina Law Enforcement Division ("SLED"). (App. p. 317-318). Petitioner was sentenced by the Honorable J. Derham Cole to five years for the grand larceny and to life without parole[1] for burglary, first degree. (App. p. 368-369). The sentences were ordered to run concurrently. (App. p. 368-369).

Petitioner filed a direct appeal of his conviction, but his conviction was affirmed by the South Carolina Court of Appeals.[2] (App. p. 172-173). Petitioner subsequently filed an application for post-conviction relief (PCR) on May 6, 2013, alleging ineffective assistance of trial counsel, trial court error, and "misconduct of the Solicitor's office and law enforcement with regards to DNA evidence." (App. p. 174). Following an evidentiary hearing, Petitioner's application was denied and dismissed with prejudice on April 10, 2015. (App. p. 253).

Prior to the denial of his original PCR application, Petitioner filed an application for forensic DNA testing to be performed on evidence related to his conviction. (App. p. 294). The application was filed pursuant to the Access to Justice Post-Conviction DNA Testing Act ("DNA Act"). (S.C. Code Ann. §§ 17-28-10, -120). A hearing was conducted before Judge Cole, where Petitioner was represented by Leah B. Moody, Esquire ("DNA Counsel").[3] The application was denied by order on May 19, 2015. (App. p. 317). Judge Cole ruled "[t]he items [Petitioner] is

[1] Petitioner was sentenced pursuant to S.C. Code Ann. § 17-25-45.
[2] Remittitur was received on May 7, 2013, but was not included in Petitioner's Appendix.
[3] Ms. Moody was appointed to represent Petitioner pursuant to S.C. Code Ann. § 17-28-60. (requiring counsel from the on-going PCR action to also represent an applicant for DNA Act application).

seeking to be tested were previously subjected to DNA testing and further testing would not provide a more probative result." (App. p. 320). Petitioner appealed the General Sessions order, but the South Carolina Court of Appeals dismissed the Notice of Appeal as being untimely filed. (App. p. 330).

Petitioner filed a second application for post-conviction relief on September 10, 2015. (App. p. 321). Petitioner raised, for the first time, the following allegations:

1) "DNA counsel, Leah B. Moody, was ineffective for failure to appeal defendant's DNA application timely under DNA Act Sec. 17-28-90(G) Decided May 18, 2015;" and
2) "DNA counsel, Leah B. Moody, was ineffective for failure to have the trial judge recuse or remove himself from the DNA hearing when requested by defendant."

Petitioner was represented by Rodney W. Richey, Esquire. Respondent was represented by Assistant Attorney General Valerie G. Giovanoli. Respondent made its Return and Motion to Dismiss on March 23, 2017. (App. p. 333). An evidentiary hearing was convened before the Honorable Robin B. Stilwell on June 29, 2017. (App. p. 341). By written order on July 7, 2017, Judge Stilwell granted Respondent's motion to deny and dismiss Petitioner's application, with prejudice. (App. p. 361). Judge Stilwell dismissed the application for failing to raise a cognizable claim, filing a successive application, and filing an application outside the statute of limitations.

Petitioner filed a Notice of Appeal on July 17, 2017. (App. p. 362). Along with the Notice of Appeal, Petitioner included an "Explanation," stating that he filed the PCR application to get an appeal from his DNA testing hearing. (App. p. 363). Petitioner stated in his "Explanation" that he is requesting that this Court allows him to appeal the ruling of the trial judge. (App. p. 363). Thereafter, Petitioner filed his Petition for Writ of Certiorari on March 16, 2018.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Because ineffective assistance of DNA counsel pursuant to S.C. Code Ann. § 17-28-60 is not a basis for relief in any post-conviction relief proceeding, the PCR court properly dismissed Petitioner's application.

Petitioner asserts that he was denied a belated appeal of a general sessions order dismissing his application for post-conviction forensic DNA testing. Petitioner asserts that because his appointed counsel for DNA Act purposes untimely filed a notice of appeal, he is entitled to post-conviction relief. However, the PCR court properly dismissed Petitioner's application, because ineffective assistance of appointed counsel for DNA Act purposes is not a valid claim for post-conviction relief.

In a PCR proceeding, a defendant collaterally attacks his *conviction* and may raise any claims of constitutional violations relating to his *conviction*. (emphasis added) Williams v. Ozmint, 380 S.C. 473, 477, 671 S.E.2d 600, 601 (2008). Under the Uniform Post-Conviction Procedure Act ("PCR Act"), an applicant may commence a PCR action on the following grounds:

> 1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
> 2) That the court was without jurisdiction to impose sentence;
> 3) That the sentence exceeds the maximum authorized by law;
> 4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> 5) That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
> 6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

S.C. Code Ann. § 17-27-20(A).

This Court has emphasized the core purpose to the PCR Act as being, aside from the two non-collateral matters specifically listed in the PCR Act, PCR is a proper avenue of relief *only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence* as authorized by Section 17-27-20(A). Al-Shabazz v. State, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000). A typical PCR claim of ineffective assistance of counsel falls into this category because, if the applicant proves his case, his conviction or sentence will be overturned. Id.

Under the DNA Act, a person convicted for burglary in the first degree may *apply for forensic DNA testing* of his DNA and any physical evidence or biological material related to his conviction or adjudication. (emphasis added) S.C. Code Ann. § 17-28-30 (A)(15). If the applicant is successful following a hearing, the DNA Act compels the court to order testing of the applicant's DNA and the physical evidence or biological material. S.C. Code Ann. § 17-28-90(B). The DNA Act does not allow for an applicant's sentence or conviction to be vacated. The performance of appointed DNA Act counsel shall *not form the basis in any post-conviction relief proceeding*. (emphasis added) S.C. Code Ann. § 17-28-60.

The DNA Act specifically states that the results of the DNA test may be used by the applicant, solicitor, or Attorney General in any post-conviction proceeding or trial. S.C. Code Ann. § 17-28-100(B). If the results of the DNA test are exculpatory, the applicant may use the exculpatory results of the DNA test as grounds for filing a motion for new trial pursuant to the South Carolina Rules of Criminal Procedure. Id. Either party shall have the right to appeal a final order denying, or granting, DNA testing, as provided by the South Carolina Appellate Court Rules. S.C. Code Ann. § 17-28-90(G).

The PCR court properly dismissed the application as it is specifically precluded by state law. The performance of counsel pursuant to [DNA Act] shall not form the basis for relief in *any post-conviction relief proceeding*. (emphasis added) S.C. Code Ann. § 17-28-60. The intent of the South Carolina General Assembly is clear, as they specifically prevented an applicant from raising an ineffective assistance of counsel claim in PCR proceedings. A court must apply the plain meaning of a statute where its language is unambiguous and conveys a clear meaning. Wade v. State, 348 S.C. 255, 559 S.E.2d 843 (2002)(citing Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)). Under the plain meaning and unambiguous language of the DNA Act, the PCR court properly dismissed Petitioner's application.

This Court has previously refused to extend PCR for judgments rendered pursuant to an unrelated statute. In Lance, an applicant was denied PCR for his adjudication as a habitual traffic offender, pursuant to S.C. Code Ann. § 56-1-1010 through 1130. Lance v. State, 279 S.C. 144, 303 S.E.2d 100 (1983). This Court affirmed, holding a judgment from a hearing under the Habitual Offender Act does not result in a sentence from a criminal conviction and, therefore, cannot be contested under the PCR Act. Id at 145. Similarly in Petitioner's case, a judgment from a hearing under the DNA Act does not result in a sentence from a criminal conviction, but instead grants or denies DNA testing that may then be used in a motion for a new trial. Therefore, the PCR court properly denied relief.

Furthermore, Petitioner asserts that his DNA counsel's failure to file a timely appeal amounts to ineffective assistance of counsel pursuant to the PCR Act. The allegation raised by Petitioner is not a cognizable claim recognized under the PCR Act, because it is not a collateral attack challenging the validity of his conviction or sentence. The outcome Petitioner is seeking from this Court is a belated review of his denied application for DNA testing. Even if his

application had been successful, that alone would not have granted Petitioner a new trial or a vacated sentence. Petitioner's claim of ineffective assistance of counsel, if he proves his case, will not result in conviction or sentenced being overturned. Therefore, PCR is not the proper avenue for relief.

CONCLUSION

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

Respectfully submitted,

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Attorney General

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By: _____
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July 12, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIFICATE OF SERVICE

I, Jordan A. Cox, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia South Carolina 29211-1589

This 12th day of July, 2018.

Jordan A. Cox
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ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

July 12, 2018

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

Re: **John Willie Mack, Sr., #257219 v. State of South Carolina**
Appellate Case No.: 2017-001570
Lower Court Case: 2015-CP-42-3806

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case.

Sincerely,

Jordan A. Cox
Assistant Attorney General
SC Bar #103157

JAC/lm
Enclosures

cc: LaNelle C. DuRant, Esquire
Trisha Allen, Director - Victim Advocacy Division